

**War Crimes and Complementarity at the ICC: How the United States of
America and the United Kingdom Have Responded to War Crimes
Allegations**

Jonathan Marcus Harrison

Submitted in accordance with the requirements for the degree of
Doctor of Philosophy

The University of Leeds

School of Law

September 2021

The candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others.

This copy has been supplied on the understanding that it is copyright material and that no quotation from the thesis may be published without proper acknowledgement.

The right of Jonathan Marcus Harrison to be identified as Author of this work has been asserted by Jonathan Marcus Harrison in accordance with the Copyright, Designs and Patents Act 1988.

Acknowledgements

I would like to thank my parents for all the moral support that they have provided me with throughout the PhD process. I would also like to thank my supervisors for the feedback that they have provided on my work.

The research conducted in this thesis is based on information that was publicly available as of 31 December 2020. Whilst there have been developments in relation to the UK government's Overseas Operations (Service Personnel and Veterans) Bill and the imposition of sanctions on senior International Criminal Court personnel by the United States of America since then, the research is reflective of the practice of the States at the time.

Abstract

This thesis will discuss the responses of the United States of America and the United Kingdom to allegations that their personnel have committed war crimes in the context of the armed conflicts in Afghanistan, and Iraq, respectively. This will be done in order to assess the extent to which these responses have complied with the principle of complementarity as found at the International Criminal Court (ICC). This is a topic of importance since such allegations have been subject to ICC scrutiny in recent years, and compliance with the principle of complementarity is a way in which both States can avoid further scrutiny. The discussion in relation to the United States centres around an analysis of criminal law applicable to allegations under scrutiny by the ICC Office of the Prosecutor (OTP); an examination of the Report of the Senate Armed Services Committee on the treatment of detainees in US armed forces custody, as well as the Senate Intelligence Committee's Report on the CIA's detention and interrogation program; before discussing the criminal investigation process in the United States. The discussion of the United Kingdom will also analyse the framework of law applicable to the crimes under OTP scrutiny, before discussing the extent to which the Baha Mousa Report demonstrates that the UK has complied with the principle of complementarity. The analysis of the UK also includes chapters discussing the impact of the Iraq Historic Allegations Team, and the potential impact of legislation aimed at preventing vexatious prosecutions. The thesis concludes by arguing whether the analysis of the situation in these two States is reflective of how the principle of complementarity was envisaged to apply at the time the Rome Statute was created.

Contents

Introduction	1
1. Why This Thesis Discusses the United States of America and the United Kingdom	2
2. Methodology	9
3. Research Aims and Focus	10
4. Outline	11
Part One	14
Chapter One: The Principle of Complementarity	14
1. The Relationship between Primacy and Complementarity	15
a. The Same Person and Conduct Test	18
b. The ICC and Positive Complementarity	22
2. The Relationship between International and Ordinary Crimes	28
a. Crimes	32
b. Defences under National Law	35
3. The ICC and Alternative Investigation Mechanisms	36
a. Amnesties	39
b. Truth Commissions	42
c. A Need for Clarity Regarding Non-Criminal Investigations	44
4. Conclusion	47
Part Two	49
Chapter Two: Criminal Law in the United States of America	49
1. The War Crimes Act	50
2. Sexual Offences	58
a. The United States Military	60
i. Rape	60
ii. Other Sexual Offences	61
b. Federal Law	63
i. Chapter 109A – Aggravated Sexual Abuse	63

ii. War Crimes Act	65
3. Torture and Cruel Treatment	65
a. Physical Pain or Suffering	68
b. Mental Pain or Suffering	73
c. Specific Intent	77
4. Conclusion	82
Chapter Three: United States Senate Reports	84
1. The Development of the DoD and CIA Detention and Interrogation Policies	87
a. The Development of the Department of Defense's Detention and Interrogation Policy	88
i. The Role of Survival, Evasion, Resistance and Escape Techniques and the Joint Personnel Recovery Agency in the Development of Interrogation Policy	88
ii. The Transfer of Policy from Guantanamo Bay to Afghanistan	97
iii. Conclusion	104
b. The Development of the CIA's Detention and Interrogation Program	105
i. Quality of Staff	106
ii. CIA Management Problems	110
iii. Contractors	118
iv. Conclusion	122
2. The Domestic Response to the Senate Reports	125
a. Armed Services Committee Report	125
b. Intelligence Committee Report	129
3. Conclusion	131
Chapter Four: Criminal Investigations in the United States	133
1. Criminal Investigations	133
a. The United States Military	135
b. The CIA	139

2. Good Faith Reliance on Legal Advice – 42 US Code s.2000dd-1	144
3. The Use of Executive Clemency	146
4. Conclusion	150
Part Three	152
Chapter Five: Criminal Law in the United Kingdom	152
1. International Criminal Court Act 2001	154
2. Geneva Conventions Act 1957	159
3. Torture as Found under s.134 of the Criminal Justice Act 1988	160
4. Homicide Offences	161
a. Murder	162
b. Unlawful Act Manslaughter	165
5. Grievous Bodily Harm	168
6. Conclusion	174
Chapter Six: The Baha Mousa Inquiry	175
1. The Development of Doctrine Regarding the Five Techniques	178
a. The Early Development of Doctrine	178
i. The Heath Declaration and the Directive on Interrogation by the Armed Forces in Internal Security Operations	178
ii. Subsequent Policy Developments	186
b. Development of Policy: 1997-2003	188
c. Responsibility for the Failure to Implement Adequate Doctrine	190
2. Operation Telic 1 Practices	195
a. The Brims Ban on Hooding	195
i. The Factual Circumstances Surrounding the Ban	195
ii. The Potential Application of the Principle of Command Responsibility	200
b. Divisional and Brigade Level Fragmentary Orders Regarding Hooding and the Handover between Operation Telic 1 and Operation Telic 2	211
3. The Liability of Ministers for the Conduct of Military Personnel	

in Iraq	214
4. Implementation of the Baha Mousa Report's Recommendations	215
5. Conclusion	222
Chapter Seven: The Iraq Historic Allegations Team	225
1. Litigation Addressing the Independence of IHAT	227
2. Political Interference in IHAT?	233
a. Government Criticism of Those Responsible for Presenting Allegations of Misconduct	234
b. The Closure of IHAT	240
3. IHAT Inefficiencies	245
4. Allegations of Cover-ups and MoD Attempts to Stop IHAT Investigations	251
5. Conclusion	254
Chapter Eight: The Overseas Operations (Service Personnel and Veterans) Bill	255
1. The Presumption against Prosecution: Clauses 1 to 4	258
2. Clause 5: Consent to Prosecute	269
3. Clause 6 and Schedule 1: The Crimes Included/Excluded from the Presumption against Prosecution	270
4. Conclusion	276
Conclusion	278
1. The United States of America	278
2. The United Kingdom	286
3. Concluding Thoughts	295
Bibliography	297

Introduction

This thesis will discuss the extent to which States comply with the principle of complementarity as found within the Rome Statute of the International Criminal Court (ICC). Article 17(1) of the Rome Statute states:

“Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court”¹

Commentary has suggested that without the principle of complementarity, the ICC would not be able to successfully fulfil their mandate.² It is therefore essential to discuss the extent to which States comply with the principle of

¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 17(1). Unwillingness is defined in Article 17(2), and inability in Article 17(3).

² See, for example: Mohamed M El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’ (2002) 23 Michigan Journal of International Law 869, 870; Office of the Prosecutor, ‘Paper on some policy issues before the Office of the Prosecutor’ (ICC, September 2003) <https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf> (Last accessed 15 May 2021) 4; Assembly of States Parties, ‘Report of the Bureau on complementarity’ (29 November 2019) ICC Doc ICC/ASP/18/25 <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-25-ENG.pdf> (Last accessed 15 May 2021), para 4. For further discussion of the principle of complementarity, see *infra* Chapter One.

complementarity in order to assess the extent to which the ICC is capable of fulfilling their mandate as set out in the Preamble to the Rome Statute.³

The discussion in this thesis will therefore concentrate on the responses to allegations of war crimes of two States who have faced scrutiny from the ICC Office of the Prosecutor (OTP) for such crimes in the United States of America and the United Kingdom. The analysis to be conducted examines the conduct of two of the permanent members of the United Nations Security Council and, as will be shown in the next section, two States with different relationships to the ICC – the UK having ratified the Rome Statute and the US having not done so. This introduction will set out the rationale for the choice of these two States; the methodology to be employed; and the aims of the research.

1. Why This Thesis Discusses the United States of America and the United Kingdom

There are multiple reasons for discussing the conduct of the two States selected, the most notable of which is the fact that both States have been subject to scrutiny by the OTP in recent years. The ICC Appeals Chamber approved the OTP's request to open an investigation into the armed conflict in Afghanistan in March 2020,⁴ a request which included allegations of war crimes committed by US personnel.⁵ This approval came after the Pre-Trial Chamber had previously decided that an investigation would not be in the interests of justice.⁶ In their investigation request, the OTP allege that members of the US military and Central Intelligence Agency (CIA) were responsible for 'the war crime of torture and cruel treatment pursuant to article 8(2)(c)(i)' of the Rome

³ Rome Statute (n 1) Preamble

⁴ *Situation in the Islamic Republic of Afghanistan* (Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan) ICC-02/17-138 (5 March 2020)

⁵ *Situation in the Islamic Republic of Afghanistan* (Public redacted version of "Request for authorisation of an investigation pursuant to Article 15") ICC-02/17-7-Red (20 November 2017), paras 187-252

⁶ *Situation in the Islamic Republic of Afghanistan* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17-33 (12 April 2019)

Statute,⁷ ‘the war crime of outrages upon personal dignity, in particular humiliating and degrading treatment, pursuant to article 8(2)(c)(ii),⁸ and ‘the war crime of rape and other forms of sexual violence pursuant to article 8(2)(e)(vi).⁹

In the case of the United Kingdom, the OTP has launched two investigations into alleged war crimes committed by members of the armed forces in Iraq. The first of these preliminary examinations was closed on 9 February 2006 on the basis that the crimes alleged did not meet the gravity threshold under the Rome Statute required for the OTP to investigate alleged offences.¹⁰ The second Preliminary Examination was launched on 13 May 2014 following receipt of a communication by the European Center for Constitutional and Human Rights and Public Interest Lawyers.¹¹ This Preliminary Examination was ultimately closed on 9 December 2020,¹² despite the OTP stating that there were ‘numerous concerns with respect to how specific decisions on certain matters were arrived at’,¹³ and concluding that:

“on the basis of the information available, there is a reasonable basis to believe that, at a minimum, the following war crimes have been committed by members of UK armed forces: wilful killing/murder under

⁷ OTP Afghanistan investigation request (n 5) para 191

⁸ *ibid* para 204

⁹ *ibid* para 207

¹⁰ Office of the Prosecutor, ‘OTP letter to senders re Iraq 9 February 2006’ (International Criminal Court, 9 February 2006) <https://www.icc-cpi.int/nr/rdonlyres/04d143c8-19fb-466c-ab77-4cdb2fdebef7/143682/otp_letter_to_senders_re_iraq_9_february_2006.pdf> (Last accessed 15 May 2021) 8-9

¹¹ International Criminal Court, ‘Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq’ (International Criminal Court, 13 May 2014) <<https://www.icc-cpi.int/pages/item.aspx?name=otp-statement-iraq-13-05-2014>> (Last accessed 15 May 2021); European Center for Constitutional and Human Rights and Public Interest Lawyers, ‘Communication to the Office of the Prosecutor of the International Criminal Court: The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008’ (European Center for Constitutional and Human Rights, 10 January 2014) <https://www.ecchr.eu/fileadmin/Juristische_Dokumente/January_2014_Communication_by_EC_CHR_and_PIL_to_ICC_OTP_re_Iraq_UK_public_version_.pdf> (Last accessed 15 May 2021)

¹² International Criminal Court, ‘Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom’ (International Criminal Court, 9 December 2020) <<https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk>> (Last accessed 15 May 2021)

¹³ *ibid*

article 8(2)(a)(i) or article 8(2)(c)(i)); torture and inhuman/cruel treatment under article 8(2)(a)(ii) or article 8(2)(c)(i)); outrages upon personal dignity under article 8(2)(b)(xxi) or article 8(2)(c)(ii)); rape and/or other forms of sexual violence under article 8(2)(b)(xxii) or article 8(2)(e)(vi)).”¹⁴

The fact that both States have been subject to ICC scrutiny serves to justify a discussion of whether the domestic processes employed by each satisfy the principle of complementarity since, as stated previously, the ICC can only act in situations where States do not comply with the principle of complementarity. Adherence with the principle of complementarity in such circumstances should be in the interests of both States, since as will be discussed further, both States reject the idea that they should be subject to ICC scrutiny.

It should be noted that despite the United States not having ratified the Rome Statute, compliance with the principle of complementarity would serve to prevent further ICC scrutiny. For example, Akande argues that the principle of complementarity serves to limit the potential jurisdiction over the nationals of States which have not ratified the Rome Statute,¹⁵ stating that ‘the complementarity principle requires the ICC to defer to the exercise of national jurisdiction by non-parties to the same extent that it requires deferral to the jurisdiction of parties.’¹⁶ Additionally, former State Department Legal Advisor John Bellinger has argued that the United States should provide information on investigations that have been carried out in order to avoid further ICC scrutiny.¹⁷ Furthermore, the OTP themselves, in their Afghanistan investigation request, have indicated that their assessment of the admissibility of any cases before the ICC may change if such information is provided.¹⁸ The Appeals Chamber have

¹⁴ Office of the Prosecutor, ‘Situation in Iraq/UK: Final Report’ (International Criminal Court, 9 December 2020) <<https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>> (Last accessed 15 May 2021), para 71

¹⁵ Dapo Akande, ‘The Jurisdiction of the International Criminal Court over the Nationals of Non-Parties: Legal Basis and Limits’ (2003) 1 *Journal of International Criminal Justice* 618, 647-48

¹⁶ *ibid* 647

¹⁷ John Bellinger, ‘The International Criminal Court and the Trump Administration’ (Lawfare, 27 March 2018) <<https://www.lawfareblog.com/international-criminal-court-and-trump-administration>> (Last accessed 15 May 2021)

¹⁸ OTP Afghanistan investigation request (n 5) para 296

also noted that the admissibility of any case before the ICC may be subject to admissibility challenge under Article 19 of the Rome Statute.¹⁹

The second reason for examining the conduct of the United Kingdom and the United States of America is that both States are permanent members of the United Nations Security Council (UNSC),²⁰ which means that both States are in a position to influence the situations the OTP can investigate. Under Article 13(b) of the Rome Statute, the UNSC, acting under Chapter VII of the UN Charter, can refer situations to the ICC.²¹ Such referrals have occurred on two previous occasions in relation to Darfur and Libya.²² However, as Trahan notes, such a referral does not mean that the OTP is obliged to launch an investigation.²³ Furthermore, under Article 16 of the Rome Statute, the UNSC can act to defer investigations and prosecutions at the ICC for a year.²⁴ This power has been used as a result of concerns by the United States that their personnel could be held liable for any crimes committed in the course of UN peacekeeping missions.²⁵ Lastly, it is possible that UNSC permanent members could use their veto under Article 27(3) of the UN Charter to prevent action being taken under either of the two situations discussed above.²⁶ As a result of these powers to influence the ICC's investigative focus, it is necessary to consider the extent to which States on the Security Council address allegations of crimes which fall within the scope of the Rome Statute.

¹⁹ Afghanistan Appeal Chamber Judgment (n 4) para 44

²⁰ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Article 23

²¹ Rome Statute (n 1) Article 13(b); *ibid* Chapter VII

²² United Nations Security Council Resolution 1593 (31 March 2005) UN Doc S/RES/1593; United Nations Security Council Resolution 1970 (26 February 2011) UN Doc S/RES/1970

²³ Jennifer Trahan, 'The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices' (2013) 24 *Criminal Law Forum* 417, 423-24

²⁴ Rome Statute (n 1) Article 16

²⁵ United Nations Security Council Resolution 1422 (12 July 2002) UN Doc S/RES/1422; United Nations Security Council Resolution 1487 (12 June 2003) UN Doc S/RES/1487. For discussion of these resolutions, which have been subject to controversy, see Trahan (n 23) 437-47; Mohamed El Zeidy, 'The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422' (2002) 35 *Vanderbilt Journal of Transnational Law* 1503; Neha Jain, 'A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court' (2005) 16(2) *European Journal of International Law* 239; and Roberto Lavalle, 'A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court' (2003) 14 *Criminal Law Forum* 195

²⁶ UN Charter (n 20) Article 27(3)

The third reason why this analysis focuses on the US and the UK is because it addresses the conduct of both an ICC member State in the United Kingdom, and a non-ICC member State in the United States. This means that, at least to some degree, it may be possible to determine the extent to which Rome Statute ratification affects State compliance with the principle of complementarity. Under the Rome Statute, the ICC is only able to assert jurisdiction in situations where alleged offences have either been referred to the ICC by the UNSC,²⁷ where crimes have taken place in a member State,²⁸ or where crimes have been committed by a member state national.²⁹ In the case of the UK, ICC jurisdiction therefore arises because the UK has ratified the Rome Statute. In the case of the United States, ICC jurisdiction arises because Afghanistan has ratified the Rome Statute. The decisions of the Pre-Trial Chamber also noted in respect of the United States that ‘the potential cases arising from the incidents presented by the Prosecution appear to be admissible’.³⁰

The difference in the relationship between the two States and the ICC is notable because whilst both States reject the notion that they should be subject to ICC scrutiny, they do so for different reasons. The UK has taken the position that ICC jurisdiction is unnecessary because they would investigate any case which could form the basis of ICC jurisdiction. For example, when seeking to implement the Rome Statute into UK law, Foreign Secretary Robin Cook argued that ‘British service personnel will never be prosecuted by the International Criminal Court because any *bona fide* allegation will be pursued by the British authorities.’³¹ Furthermore, upon the announcement of the OTP’s Preliminary Examination in May 2014, Attorney General Dominic Grieve stated:

“British troops are some of the best in the world and we expect them to operate to the highest standards, in line with both domestic and international law. In my experience the vast majority of our armed forces

²⁷ Rome Statute (n 1) Article 13(b)

²⁸ Rome Statute (n 1) Article 12(2)(a)

²⁹ Rome Statute (n 1) Article 12(2)(b)

³⁰ Afghanistan PTC Decision (n 6) para 79

³¹ HC Deb 3 April 2001 vol 366 col 222

meet those expectations. Where allegations have been made that individuals may have broken those laws, they are being comprehensively investigated.”³²

The position of the United States, which has had a relationship with the ICC that has included periods of hostility,³³ has rejected the assertion of ICC jurisdiction based on the fact that it is not a party to the Rome Statute. For example, in testimony to the Senate Foreign Relations Subcommittee, Ambassador David Scheffer, who led the US negotiating team at the Rome Conference, stated, ‘Our position is clear. Official actions of a non-party state should not be subject to the Court’s jurisdiction if that country does not join the treaty, except by means of Security Council action under the U.N. Charter.’³⁴ This position has

³² Attorney General’s Office and Dominic Grieve, ‘Statement on ICC preliminary examination into Iraq allegations’ (Attorney General’s Office, 13 May 2014) <<https://www.gov.uk/government/news/statement-on-icc-preliminary-examination-into-iraq-allegations>> (Last accessed 15 May 2021). Foreign Secretary William Hague also stated prior to the Preliminary Examination being opened that ‘These allegations are either under investigation or have been dealt with in a variety of ways.’: BBC News, ‘William Hague rejects Iraq ‘abuse’ complaint to ICC’ (BBC News, 12 January 2014) <<https://www.bbc.co.uk/news/uk-25703723>> (Last accessed 15 May 2021)

³³ For discussion of the objectives of the United States at negotiations for the Rome Statute, see David J Scheffer, ‘The United States and the International Criminal Court’ (1999) 93 *American Journal of International Law* 12. For a discussion of the relationship between the US and the ICC in the Clinton Administration, see Eric P Schwartz, ‘The United States and the International Criminal Court: The Case for “Dexterous Multilateralism”’ (2003) 4(1) *Chicago Journal of International Law* 223. For discussion of the relationship between the US and the ICC during the Bush Administration, see for example: John P Cerone, ‘Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals’ (2007) 18(2) *European Journal of International Law* 277, 293-305; and Andrea Birdsall, ‘The Monster That We Need to Slay – Global Governance, the United States, and the International Criminal Court’ (2010) 16 *Global Governance* 451, 457-64. For a discussion of the relationship between the US and the ICC during the Obama Administration, see Megan A Fairlie, ‘The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage’ (2011) 29 *Berkeley Journal of International Law* 528. For the views of the Trump Administration, see for example, White House, ‘Remarks by President Trump to the 73rd Session of the United Nations General Assembly | New York, NY’ (White House, 25 September 2018) <<https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/>> (Last accessed 15 May 2021); Michael R Pompeo, ‘ICC Decision on Afghanistan’ (United States Department of State, 5 March 2020) <<https://2017-2021.state.gov/icc-decision-on-afghanistan//index.html>> (Last accessed 15 May 2021); and Michael R Pompeo, ‘Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court’ (United States Department of State, 2 September 2020) <<https://2017-2021.state.gov/actions-to-protect-u-s-personnel-from-illegitimate-investigation-by-the-international-criminal-court//index.html>> (Last accessed 15 May 2021)

³⁴ Subcommittee on International Operations, ‘Is a U.N. International Criminal Court in the U.S. National Interest?’ (Senate Hearing 105-724, 23 July 1998) <<https://www.govinfo.gov/content/pkg/CHRG-105shrg50976/pdf/CHRG-105shrg50976.pdf>> (Last accessed 15 May 2021) 13. The objection to ICC jurisdiction over US personnel was just one of a number of concerns that the US had to the Rome Statute. For a discussion of these

remained constant with the Secretary of State under the Trump Administration, Mike Pompeo, stating in October 2019 that:

“The United States is not a party to the ICC’s Rome Statute and has consistently voiced its unequivocal objections to any attempts to assert ICC jurisdiction over U.S. personnel. An investigation by the ICC of U.S. personnel would be unjustified and unwarranted”³⁵

It will therefore be prudent to examine to what extent the actions taken by the two States to address allegations of international crimes are different, as this will provide an insight as to the importance they place on the principle of complementarity.

The final reason for discussing the conduct of the United Kingdom and the United States of America is that both States have well-established judicial systems. For example, in the 2020 Freedom House *Freedom in the World* Report, the United States scored 11 out of 16 points on the rule of law,³⁶ and the United Kingdom 14 out of 16.³⁷ The scores of both the US and the UK are substantially higher than scores in other States where the ICC has launched investigations. For example, Libya scored 0 points,³⁸ and the Report stated that ‘the national judicial system has essentially collapsed, with courts unable to function in much of the country’.³⁹ The Democratic Republic of Congo also scored 0 points with the Report noting that ‘soldiers and police regularly commit serious human rights abuses, including rape and other physical attacks, and

concerns, see, for example, Jordan J Paust, ‘The U.S. and the ICC: No More Excuses’ (2013) 12 Washington University Global Studies Law Review 563, 563-68.

³⁵ Michael R Pompeo, ‘U.S. Policy on the International Criminal Court Remains Unchanged’ (United States Department of State, 9 October 2019) <<https://2017-2021.state.gov/u-s-policy-on-the-international-criminal-court-remains-unchanged/index.html>> (Last accessed 15 May 2021)

³⁶ Freedom House, ‘Freedom in the World 2020: United States’ (Freedom House) <<https://freedomhouse.org/country/united-states/freedom-world/2020>> (Last accessed 15 May 2021)

³⁷ Freedom House, ‘Freedom in the World 2020: United Kingdom’ (Freedom House) <<https://freedomhouse.org/country/united-kingdom/freedom-world/2020>> (Last accessed 15 May 2021)

³⁸ Freedom House, ‘Freedom in the World 2020: Libya’ (Freedom House) <<https://freedomhouse.org/country/libya/freedom-world/2020>> (Last accessed 15 May 2021)

³⁹ *ibid*

high-ranking officials enjoy impunity for crimes.⁴⁰ The Central African Republic scored 1 point and it was stated that ‘impunity for violence, economic crimes, and human rights violations remained widespread in 2019.’⁴¹ The discussion in this study may therefore serve to provide an insight as to how the complementarity regime applies in States which should be both willing and able to investigate the most serious of crimes.

2. Methodology

The research conducted in this thesis is doctrinal in nature. Hutchinson and Duncan state the following in relation to doctrinal research:

“The doctrinal research methodology is much more than ‘scholarship’. It is the location and analysis of the primary documents of the law in order to establish the nature and parameters of the law. That is the crux of the doctrinal method. The ‘screening criteria’ for legal primary materials are necessarily more rule bound and intricate. Doctrinal research also requires a trained expert in legal doctrine to read and analyse the law – the primary sources: the legislation and case law. Doctrinal research is not simply the locating of secondary information. It includes the intricate step of ‘reading, analysing and linking’ the new information to the known body of law.”⁴²

The research presented in this thesis, which discusses information available as of 31 December 2020, consists of an examination of a wide range of sources. These sources include the Reports of the United States Senate to be discussed in Chapter Three, and the Baha Mousa Report to be discussed in Chapter Five, as well as other related documents. Additionally, this thesis will also discuss

⁴⁰ Freedom House, ‘Freedom in the World 2020: Democratic Republic of Congo’ (Freedom House) <<https://freedomhouse.org/country/democratic-republic-congo/freedom-world/2020>> (Last accessed 15 May 2021)

⁴¹ Freedom House, ‘Freedom in the World 2020: Central African Republic’ (Freedom House) <<https://freedomhouse.org/country/central-african-republic/freedom-world/2020>> (Last accessed 15 May 2021)

⁴² Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17(1) Deakin Law Review 83, 113

reports and statements of United Nations human rights bodies, the reports of the OTP, relevant criminal law cases in both the domestic and international settings, judgments of the European Court of Human Rights, and official statements of government representatives in the UK and US. Additionally, it will also be necessary to examine secondary sources to supplement the analysis of primary sources conducted. This will occur through the examination of academic commentary, statements of non-governmental organisations, and media coverage of the contents examined within the thesis.

This thesis will serve to critique the investigative steps taken by the United States and United Kingdom to address specific allegations of criminal misconduct in Afghanistan and Iraq, respectively, and assess whether they comply with the principle of complementarity. Any recommendations on how to improve the principle of complementarity should be the result of studies examining a broader array of situations subject to ICC scrutiny.

3. Research Aims and Focus

In order to accomplish the ultimate aim of this study, which is to explore the extent to which the United States of America and the United Kingdom have complied with the principle of complementarity, it will be necessary to discuss the following issues:

- The importance of the principle of complementarity and any potential scope for conflict between the aims of States and the ICC;
- The criminal offences under US and UK law applicable to allegations which have been subject to ICC scrutiny;
- The non-criminal investigative processes which have been deployed by the United States and the UK addressing the conduct which forms the basis of ICC scrutiny;
- The criminal investigation processes which have been utilised by the UK and the US to address alleged war crimes, and;

- How complementarity affects the interaction between the ICC and both member States and non-member States.

4. Outline

This thesis will be split into three parts. Part One, consisting of a single chapter will address the first research aim, which is to discuss the principle of complementarity. As well as setting out in further detail what the principle of complementarity requires from States, the Chapter will discuss the relationship between complementarity and primacy, which had served as the basis of jurisdiction at the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR);⁴³ the relationship between ordinary crimes (those crimes found within the legal systems of States) and international crimes; and whether the use of non-criminal justice mechanisms are compatible with the principle of complementarity.

The following two parts of the thesis, each of which analyses one of the States being discussed, will seek to address the remaining research objectives. Part Two, which consists of three chapters, will investigate the United States and actions that they have taken to address alleged war crimes which took place in relation to the armed conflict in Afghanistan. The first of these chapters, Chapter Two, will discuss a selection of crimes applicable to the US military and CIA personnel in order to demonstrate whether the US is able to prosecute the offences being scrutinised by the ICC in a manner which reflects their seriousness. Chapter Three will examine two reports of the United States Senate, the Senate Armed Services Committee Report into the Department of Defense's Detention and Interrogation Program, and the Senate Intelligence Committee Report into the CIA's Detention and Interrogation Program. The discussion in this Chapter will seek to examine whether it is possible for non-

⁴³ Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted under United Nations Security Council Resolution 827 (25 May 1993) UN Doc S/RES/827, as amended, Article 9(2); Statute of the International Criminal Tribunal for Rwanda, adopted under United Nations Security Council Resolution 955 (8 November 1994) UN Doc S/RES/955, as amended, Article 8(2)

criminal investigation processes to form part of the process through which a State can argue that it has complied with the principle of complementarity. In this case, such an examination is important since the two United States Senate Reports were cited by the OTP in their Afghanistan investigation request on numerous occasions.⁴⁴ The final chapter in Part Two, Chapter Four, will address criminal investigation processes that have been employed by the United States in order to assess the extent to which the US is willing to carry out such measures. Additionally, other measures, such as the use of clemency and a policy to not prosecute those who have relied in good faith on defective legal advice, will be discussed in order to assess the extent to which the United States is willing to conduct such investigations.

Part Three, which consists of four chapters, will discuss the processes employed by the United Kingdom to address alleged war crimes committed in the armed conflict in Iraq. Chapter Five will discuss a range of offences applicable to the alleged conduct which was examined by the OTP in their preliminary examination. The purpose of this section, as is the case with Chapter Two's discussion of offences under US law, is to assess the extent to which the UK can conduct investigations or prosecutions into alleged war crimes. Chapter Six will discuss the Baha Mousa Report, which is one of two Reports commissioned by the UK government to examine allegations of detainee abuse in Iraq – the other being the Al Sweady Report – in order to assess the extent to which this particular non-criminal investigative process can contribute to the process of complying with the principle of complementarity. Chapter Seven will discuss the work of the Iraq Historic Allegations Team (IHAT), a criminal investigative body created by the UK government in 2010 to investigate allegations of misconduct by UK forces in Iraq. The purpose of this Chapter is to address the extent to which the UK was willing to conduct investigations and prosecutions into offences which took place in Iraq. Finally, Chapter Eight will examine the Overseas Operations (Service Personnel and Veterans) Bill, introduced by the UK government to 'protect our veterans against

⁴⁴ See OTP Afghanistan investigation request (n 5) generally

repeated reinvestigations',⁴⁵ and which seeks to impose a presumption against prosecution, which can be overridden only in exceptional circumstances, in relation to crimes committed on overseas operations more than five years ago.⁴⁶ This discussion will assess the extent to which the UK is truly willing to investigate alleged offences which took place in Iraq, since the government has confirmed that the Bill could apply to alleged offences taking place in Iraq.⁴⁷

⁴⁵ Ministry of Defence, Johnny Mercer and Ben Wallace, 'Armed Forces protected from vexatious claims in important step' (Ministry of Defence, 18 March 2020) <<https://www.gov.uk/government/news/armed-forces-protected-from-vexatious-claims-in-important-step>> (Last accessed 15 May 2021)

⁴⁶ Overseas Operations (Service Personnel and Veterans) HC Bill (2019-21) [117] cls 1-3

⁴⁷ Overseas Operations (Service Personnel and Veterans) Bill Deb 14 October 2020 cols 193-94

Part One

Chapter One: The Principle of Complementarity

The Preamble to the Rome Statute states that the International Criminal Court (ICC) ‘shall be complementary to national criminal jurisdictions’.¹ Under Article 17 of the Rome Statute, the ICC is unable to assert its jurisdiction unless a State is willing and able to do so itself.² This means that the relationship between the ICC and its State parties is integral to ensure the smooth operation of the Court. In her dissenting opinion in the *Kenyatta* admissibility appeal, Judge Ušacka stated that ‘complementarity reinforces the principle of international law that it is the sovereign right of every State to exercise its criminal jurisdiction; but it also ensures that the Court can step in to give effect to the goals of international criminal justice’.³ This shows how complementarity is designed to balance the interests of the ICC with the interests of States.

However, this balancing act is one which has caused controversy in the ICC’s assertion of their jurisdiction as, amongst other things, the ICC has been accused of prolonging the conflict in the Côte d’Ivoire,⁴ and acting too quickly,⁵ as well as too inconsistently in Libya.⁶ This may act to the detriment of the Court because, as stated in a 2003 document published by the Office of the Prosecutor (OTP), ‘the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success’.⁷ Acting in

¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Preamble

² *ibid*, Article 17

³ *Prosecutor v Muthaura, Kenyatta and Ali* (Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”) (Dissenting Opinion of Judge Anita Ušacka) ICC-01/09-02/11-342 (20 September 2011), para 19

⁴ Mike McGovern, ‘The Ivorian Endgame’ (Foreign Affairs, 14 April 2011) <<https://www.foreignaffairs.com/articles/west-africa/2011-04-14/ivorian-endgame>> (Last accessed 15 May 2021)

⁵ Payam Akhavan, ‘Complementarity Conundrums’ (2016) 14 *Journal of International Criminal Justice* 1043, 1052-54

⁶ Nidal Nabil Jurdi, ‘The Complementarity Regime of the International Criminal Court in Practice: Is it Truly Serving the Purpose? Some Lessons from Libya’ (2017) 30 *Leiden Journal of International Law* 199, 215

⁷ Office of the Prosecutor, ‘Paper on some policy issues before the Office of the Prosecutor’ (International Criminal Court, September 2003) <<https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6->

a way which could be described as being too quick or inconsistent would serve to potentially deprive States of the opportunity to show that their judiciaries do function effectively. This may indicate that the interests of States are not always be aligned with the OTP's strategic priorities.

In order to provide a basis for the analysis to be conducted in Chapters Two-Eight on the approaches taken by the United States of America and the United Kingdom in relation to alleged war crimes, this chapter will analyse three aspects of the principle of complementarity which highlight reasons why the interests of States and the OTP may not always be aligned. These are: (i) the relationship between primacy and complementarity, (ii) the difference between ordinary and international crimes, and (iii) the acceptability of alternative justice mechanisms.

1. The Relationship between Primacy and Complementarity

Ever since the initial draft of the Rome Statute was published by the International Law Commission, the ICC was intended to be complementary to domestic jurisdictions,⁸ and this has been emphasised in both the Preamble to the Rome Statute,⁹ before being further emphasised in Article 17 of the Rome Statute.¹⁰ This constitutes a change from the situation that existed at the tribunals established by the United Nations Security Council under Chapter VII of the UN Charter, in the form of International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹¹ Article 9(2) of the ICTY Statute states that 'the International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal

de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf> (Last accessed 15 May 2021), 4

⁸ 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, 27

⁹ Rome Statute (n 1) Preamble

¹⁰ Ibid, Article 17

¹¹ Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted under United Nations Security Council Resolution 827 (25 May 1993) UN Doc S/RES/827, as amended; Statute of the International Criminal Tribunal for Rwanda, adopted under United Nations Security Council Resolution 955 (8 November 1994) UN Doc S/RES/955, as amended; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapter VII

may formally request national courts to defer to the competence of the International Tribunal'.¹² The relationship between these two concepts is one that has been subject to much academic commentary regarding whether there are differences between these two principles or not. Gioia, for example, argues that the primacy of the ICTR and ICTY was 'an application *ante litteram* of the complementarity principle to the situations experienced in the former Yugoslavia and Rwanda'.¹³

This means that whilst it can be argued that there are similarities between the concepts of primacy and complementarity, it is not clear to what extent that this is the case. Brown, for example, argues that the reason the ICTY and ICTR were granted primacy was because it was necessary in order to help ensure international peace and security,¹⁴ and that the weaknesses of those tribunals meant that an alternative to primacy was required for the ICC to be successful.¹⁵ In addition, it is doubtful whether numerous States would have made clear their support for the principle of complementarity during the Rome Diplomatic Conference if complementarity was the same as the principle of primacy which existed in two pre-existing international tribunals.¹⁶ Furthermore, the Rome Statute states that if a State informs the ICC that they are carrying out an investigation into a situation the ICC is interested in, the OTP must defer to the State's investigatory process unless the Pre-Trial Chamber decides to authorise an investigation.¹⁷ This is in contrast to the position under the ICTY

¹² ICTY Statute (n 11) Article 9(2). Article 8(2) of the ICTR Statute (n 11) makes a similar statement in relation to the ICTR.

¹³ Federica Gioia, 'State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 *Leiden Journal of International Law* 1095, 1116

¹⁴ Bartram S Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 *Yale Journal of International Law* 383, 407

¹⁵ *ibid* 430-31

¹⁶ For numerous examples of States supporting the use of the principle of complementarity at the Rome Conference, see United Nations General Assembly, 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' UN Doc A/CONF.183/13 (Vol II), 64-129. State support for the concept of the principle of complementarity will be discussed further *infra* 30-31 in the context of a discussion of the distinction between ordinary and international crimes.

¹⁷ Rome Statute (n 1) Article 18(2)

and ICTR Statutes which state that the Tribunals could make States defer their jurisdiction over international crimes.¹⁸

A consideration of any potential similarities between the principle of complementarity and primacy is important, since this study involves the discussion of a State, in the United States of America, which has not ratified the Rome Statute and rejects the idea that non-ICC Member States can be subject to the Rome Statute except in instances referred by the United Nations Security Council.¹⁹ Additionally, Newton argues that following an Article 98 agreement entered into by the United States and Afghanistan:

“There is simply no credible argument that Afghanistan had any lawful authority to prosecute American forces for any acts committed on or after May 28, 2003. Acts that were literally committed “on the territory” of Afghanistan could therefore not lawfully be delegated to the ICC based on the principle of transferred territoriality that is the bedrock of Article 12 authority over the nationals of non-States Parties.”²⁰

The ICC Appeals Chamber stated that whilst such arguments are not relevant in the context of a decision concerning whether to open an investigation or not, they may be relevant in the context of a challenge to ICC jurisdiction under Article 19 of the Rome Statute.²¹ However, despite this, it does seem clear why non-parties to the Rome Statute may perceive complementarity and primacy to

¹⁸ ICTY Statute (n 11) Article 9(2); ICTR Statute (n 11) Article 8(2)

¹⁹ Subcommittee on International Operations, ‘Is a U.N. International Criminal Court in the U.S. National Interest?’ (Senate Hearing 105-724, 23 July 1998) <<https://www.govinfo.gov/content/pkg/CHRG-105shrg50976/pdf/CHRG-105shrg50976.pdf>> (Last accessed 15 May 2021), 13

²⁰ Michael A Newton, ‘How the International Criminal Court Threatens Treaty Norms’ (2016) 49 *Vanderbilt Journal of Transnational Law* 371, 408. A similar argument was advanced during proceedings before the Appeals Chamber in relation to the OTP’s appeal against the Pre-Trial Chamber’s decision not to authorise an investigation into Afghanistan: *Situation in the Islamic Republic of Afghanistan* (Transcript of hearing, 5 December 2019) ICC-02/17-T-002-ENG (5 December 2019), 101-04. For an opposing view, see, for example, Cormier, who argues that the act of agreeing to a Status of Forces Agreement does not restrict the ICC’s ability to assume jurisdiction in the Afghanistan situation: Monique Cormier, ‘Can the ICC Exercise Jurisdiction over US Nationals for Crimes Committed in the Afghanistan Situation?’ (2018) 16 *Journal of International Criminal Justice* 1043, 1060-61.

²¹ *Situation in the Islamic Republic of Afghanistan* (Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan) ICC-02/17-38 (5 March 2020), para 44

be one and the same if the end result is that the ICC is able to assert jurisdiction. The remainder of this section will discuss the effects of the same person and conduct test and the idea of positive complementarity to further discuss the application of the principle of complementarity.

a. The Same Person and Conduct Test

The first area in which the practice of the ICC in relation to the principle of complementarity bears similarities with primacy is in relation to cases where States have already commenced investigations or prosecutions in relation to international crimes. Article 17 of the Rome Statute states that a case is inadmissible before the ICC unless a State is 'unwilling or unable genuinely to carry out the investigation or prosecution'.²² However, in the case of *Lubanga*, it was stated that 'the 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'.²³ This meant that the Pre-Trial Chamber held that the case against Lubanga was admissible before the ICC as charges in the Democratic Republic of Congo did not address the alleged use of child soldiers.²⁴ A further application of this test can be seen in the case of Simone Gbagbo, who had been charged with offences including 'economic crimes',²⁵ and 'crimes against the state',²⁶ which were held not to amount to the same case being investigated by the OTP.²⁷ This decision was affirmed by the Appeals Chamber.²⁸

²² Rome Statute (n 1) Article 17(1)

²³ *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 (10 February 2006), para 31

²⁴ *ibid* para 39

²⁵ *Prosecutor v Simone Gbagbo* (Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo) ICC-02/11-01/12/12-47-Red (11 December 2014), para 47

²⁶ *ibid* para 48

²⁷ *ibid* paras 47-48

²⁸ *Prosecutor v Simone Gbagbo* (Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo") ICC-02/11-01/12-75-Red (27 May 2015), para 71

Whilst Lubanga's eventual conviction was praised by Koh on the basis that it 'highlights the brutal practice of conscripting and using children to fight in armed conflict',²⁹ the consequences of the same person and conduct test have been criticised. Heller, for example, criticises the decision reached in *Lubanga* on the basis that the ICC's interest in the conscription of child soldiers ignores the interests of victims by prioritising conscription over alleged sexual crimes committed, which is stated to run contrary to the ICC's stated aims of safeguarding the rights of victims.³⁰ In addition, Heller further argues that because States emerging from conflicts may be unable to conduct wide-ranging prosecutions, it may be a better use of their resources to conduct only selective prosecutions.³¹ Finally, Heller argues that the test set out in *Lubanga* 'means that states are completely at the mercy of the OTP. If the OTP is sufficiently committed to prosecuting a suspect itself, it will almost always be able to do so. This is not complementarity – it is primacy'.³²

Furthermore, the same person element of the test set out in *Lubanga* has been criticised on the basis that it discriminates against States employing practices that had been employed by previous international criminal tribunals. Smith, for example states '*Lubanga* effectively eliminates the option of adopting an ICTY-style "pyramidal" prosecutorial strategy'.³³ In addition, Heller argues that the rejection of Kenya's argument that cases before the ICC should be inadmissible on the basis of a pyramid strategy by both Pre-Trial Chamber II and the Appeals

²⁹ Harold Hongju Koh, 'International Criminal Justice 5.0' (2013) 38(2) *Yale Journal of International Law* 525, 538. This is an important view because Koh served as the legal advisor for the United States State Department at a time when the Obama Administration sought to strengthen its relationship with the ICC: United States Department of State, 'U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference' (US Department of State, 25 June 2010) <https://2009-2017.state.gov/j/gcj/us_releases/remarks/2010/143178.htm> (Last accessed 15 May 2021)

³⁰ Kevin Jon Heller, 'Radical Complementarity' (2016) 14 *Journal of International Criminal Justice* 637, 654

³¹ *ibid* 658. See Mohamed M El Zeidy, 'The Gravity Threshold under the Statute of the International Criminal Court' (2008) 19 *Criminal Law Forum* 35 for an explanation of why selective prosecutions have to be employed by the ICC.

³² Heller (n 30) 649

³³ Stephen Eliot Smith, 'Inventing the Laws of Gravity: The ICC's Initial *Lubanga* Decision and its Regressive Consequences' (2008) 8 *International Criminal Law Review* 331, 343. Cassese describes the pyramidal strategy stating, 'in this approach, the prosecution would first target lower-level suspects, and then gradually move on to military commanders and political and military leaders': Antonio Cassese, 'The ICTY: A Living and Vital Reality' (2004) 2 *Journal of International Criminal Justice* 585, 586.

Chamber meant that it was ‘very unlikely’ that any of the ICC would accept such a strategy.³⁴

It must be noted though that it is unclear to what extent these assertions are accurate, as the Appeals Chamber in *Ruto* stated that:

“Kenya’s assertions that the Pre-Trial Chamber did not believe it even though there was no evidence contradicting Kenya’s submissions, and that the Chamber adopted a hostile attitude and made erroneous findings on the basis of Kenya’s legal submissions is equally unfounded. Nowhere in the Impugned Decision did the Pre-Trial Chamber find that Kenya was not to be trusted. The Pre-Trial Chamber rejected the Admissibility Challenge not because it did not trust Kenya or doubted its intentions, but rather because Kenya failed to discharge its burden to provide sufficient evidence to establish that it was investigating the three suspects.”³⁵

Additionally, in the *Simone Gbagbo* case, the Pre-Trial Chamber stated that it could not determine what the focus of the investigation against Gbagbo was, and what steps Côte d’Ivoire had taken to investigate.³⁶ This means that it may be possible to argue that the *Lubanga* decision may not be as damaging as it first appears, as in individual cases the ICC has attempted to make it clear that they have reached their decisions as a result of the conduct of the State in question.

The OTP’s 2019-21 Strategic Plan also states that:

³⁴ Heller (n 30) 644

³⁵ *Prosecutor v Ruto, Kosgey and Sang* (Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”) ICC-01/09-01/11-307 (30 August 2011), para 84. It is also unclear whether Kenya was truly committed to the exercise of justice – see Chandra Lekha Sriram and Stephen Brown, ‘Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact’ (2012) 12 *International Criminal Law Review* 219.

³⁶ *Gbagbo* (n 25) para 76

“when appropriate, the Office will consider bringing cases against notorious or mid-level perpetrators who are directly involved in the commission of crimes, to provide deeper and broader accountability and also to ultimately have a better prospect of conviction in potential subsequent cases against higher-level accused.”³⁷

In response to the draft version of this plan, Whiting stated:

“This strategy recognizes that given the challenges facing the court, sometimes less is more and the court cannot succeed without fulfilling its core mission of successfully prosecuting perpetrators of Rome Statute crimes. Moreover, the strategy recognizes that the ICC is a nascent tribunal and needs to build its legitimacy and competence over time by proving it can bring successful cases.”³⁸

It therefore appears clear that the ICC is open to a pyramidal approach to prosecutions, and the recently published Independent Expert Review into the ICC has recommended that such an approach be taken in some circumstances.³⁹ The Independent Expert Review did however note that there was a wider context to the pursuit of lower level perpetrators stating that ‘it is critical that their participation in the overall criminal conduct constitutes part of a strategic plan that is designed to facilitate the subsequent prosecution of those in leadership positions.’⁴⁰ Exactly how the OTP manages its prosecutorial policy to adapt to such an approach will have to be examined in the coming years. This is especially the case in relation to the application of the principle of complementarity, as States will have to be allowed the time to fully implement

³⁷ Office of the Prosecutor ‘Strategic Plan: 2019-2021’ (International Criminal Court, 17 July 2019) <<https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf>> (Last accessed 15 May 2021), 20

³⁸ Alex Whiting, ‘ICC Prosecutor Signals Important Strategy Shift in New Policy Document’ (Just Security, 17 May 2019) <<https://www.justsecurity.org/64153/icc-prosecutor-signals-important-strategy-shift-in-new-policy-document/>> (Last accessed 15 May 2021)

³⁹ Panel of Independent Experts, ‘Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report’ (ICC Assembly of States Parties, 30 September 2020) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf> (Last accessed 15 May 2021), para R233

⁴⁰ *ibid* para 670

their own prosecutorial strategies before the OTP/ICC will be able to accurately assess the extent to which a State has conducted its own investigations and prosecutions. The approach taken by the OTP will also have to reconcile the fact that the Independent Expert Review also recommended that ‘the OTP should not have regard to prospective national proceedings and focus solely on whether national proceedings are or were ongoing.’⁴¹

As a result of these findings, the OTP should take a more pragmatic approach towards determining whether State investigations have complied with the principle of complementarity and base prosecutorial decisions on whether States have tried to address allegations involving the alleged perpetration of international crimes. Factors which may have to be considered in this regard are the length of time which has elapsed since the alleged crimes took place, whether States have attempted to address past wrongdoing, the extent to which a State has a functioning judicial system and whether any crimes that were committed were the result of official State policy. These factors will be discussed in the remainder of this Chapter.

b. The ICC and Positive Complementarity

The very fact that the criticism of the ICC’s application of the principle of complementarity exists suggests that it may be necessary for the ICC and the OTP to consider whether criminal prosecutions are the sole way to satisfy the principle of complementarity. This is important because, as Rodman notes, the ICC’s lack of enforcement mechanisms mean that the ICC’s effectiveness is highly dependent on State cooperation which may not always be forthcoming.⁴² Such a policy shift may also be essential if the OTP is to keep to its commitment of taking a positive approach to complementarity.⁴³ Burke-White states:

⁴¹ *ibid* para R262

⁴² Kenneth A Rodman, ‘Justice as a Dialogue Between Law and Politics’ (2014) 12 *Journal of International Criminal Justice* 437, 440-41

⁴³ For an example of this commitment, see Office of the Prosecutor, ‘Strategic Plan: 2016 – 2018’ (International Criminal Court, 16 November 2015) <https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf> (Last accessed 15 May 2021), para 57

“Applied in practice, a policy of positive complementarity means that the OTP would actively encourage investigation and prosecution of international crimes within the Court’s jurisdiction by States where there is reason to believe that such States may be able or willing to undertake genuine investigations and prosecutions and where the active encouragement of national proceedings offers a resource-effective means of ending impunity.”⁴⁴

Koh states that this principle ‘underscores the importance of institution-building that can serve developing and post-conflict societies well’,⁴⁵ and that it ‘empowers local populations to take ownership of the accountability process and to bear direct witness to the lesson that grave international crimes carry consequences’.⁴⁶

However, the extent to which any notion of positive complementarity is positive for the ICC’s smooth operation is doubtful. On one hand, such a notion may be seen by some States as the ICC getting too involved in their affairs. This means that despite the ICC’s intentions to encourage the use of domestic jurisdiction, they may in fact be seen as attempting to assert primacy. Brighton, for instance, highlights that in the Kenya cases, the ICC may have acted in a manner which suggests that Kenya was not acting in good faith in regards to their investigatory processes.⁴⁷ From the document submitted by the Kenyan government in support of their appeal in *Ruto*, it is clear that the Kenyan government felt that key arguments in relation to its domestic investigation processes had not been considered by the Pre-Trial Chamber.⁴⁸ They even refer to the finding that investigations were not ongoing as being ‘irrational’.⁴⁹ This shows that there are

⁴⁴ William W Burke-White, ‘Implementing a Policy of Positive Complementarity in the Rome System of Justice’ (2008) 19 *Criminal Law Forum* 59, 62

⁴⁵ Koh (n 29) 538

⁴⁶ *ibid*

⁴⁷ Claire Brighton, ‘Avoiding Unwillingness: Addressing the Political Pitfalls Inherent in the Complementarity Regime of the International Criminal Court’ (2012) 12 *International Criminal Law Review* 629, 657-59

⁴⁸ *Prosecutor v Ruto, Kosgey and Sang* (Document in Support of the “Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute) ICC-01/09-01/11-135 (20 June 2011), paras 43-45

⁴⁹ *ibid* para 51.

feelings of distrust between the ICC and some of its members. Such a feeling may not be completely unwarranted, as O'Callaghan argues that the fact that the ICC has created a wide range of rules governing the principle of complementarity suggests that the ICC does not expect to be in a position where only States prosecute international crimes.⁵⁰

The arguments of the Kenyan Government that domestic reforms be considered by the ICC as a part of the process of determining admissibility marks a clear desire on the part of States for the ICC to take into account a wider variety of investigatory processes and reforms.⁵¹ This may be a particularly desirable outcome when Meernik's findings that there are a number of reasons why States may choose to oppose the ICC's activities rather than comply with them are considered.⁵² In situations where States are not naturally inclined to cooperate with the ICC, it surely is in the ICC and OTP's best interests to consider a wider range of State activities when deciding whether complementarity has been complied with.

There is another side to the argument that positive complementarity may be seen as encroaching too much on the rights of States - that complementarity may instead allow States to do whatever they like. Stahn, for example, argues that if the ICC is seen to defer all its authority to States on the basis of complementarity, it will be able to use this deference to justify its inactivity.⁵³ It is also argued that such deference may serve to counter the interests of justice by either delaying justice or making it more difficult to obtain evidence.⁵⁴ Additionally, in the context of the closure of the OTP's preliminary examination into the UK, Sterio argued that in future, States may be able to successfully

⁵⁰ Declan O'Callaghan, 'Is the International Criminal Court the Way Ahead?' (2008) 8 *International Criminal Law Review* 533, 545

⁵¹ *Ruto* (n 48) paras 9-11

⁵² James Meernik, 'Justice, Power and Peace: Conflicting Interests and the Apprehension of ICC Suspects' (2013) 13 *International Criminal Law Review* 169, 183-84

⁵³ Carsten Stahn, 'Complementarity: A Tale of Two Notions' (2008) 19 *Criminal Law Forum* 87, 109

⁵⁴ *ibid*

argue that they have complied with the principle of complementarity even where they have conducted inadequate investigations.⁵⁵

These factors mean that Burke-White's vision of the threat of intervention by the ICC encouraging States to carry out their own prosecutions may be ineffective,⁵⁶ depending on how the ICC decides to interpret their obligation to ensure that States carry out prosecutions where they have the capacity to do so. Consequently, the ICC must apply a careful balance between deferring to the interests of individual States and ensuring that international justice is seen to be done.

In relation to domestic institution building, based on the Libya cases, it is unclear to what extent the ICC is truly committed to this notion. In *Gaddafi*, it was held that a case would be admissible before the ICC because Libya was not investigating the same conduct as the ICC were,⁵⁷ because the Libyan judiciary was not in a position to be able to try Gaddafi because they were unable to take Gaddafi into custody,⁵⁸ and because there had been difficulties in ensuring that Gaddafi had legal representation.⁵⁹ However, in *Al-Senussi*, it was held that not only was Libya investigating the same case as the ICC,⁶⁰ there was nothing that meant that Libya was unable to carry out its own prosecution of Al-Senussi.⁶¹ Both of these decisions were affirmed on appeal.⁶²

⁵⁵ Milena Sterio, 'The ICC Prosecutor's Final Report into the Iraq/UK Investigation: Concerns Over Complementarity and the Court's Future Legitimacy' (IntLawGrrls, 9 December 2020) <<https://ilg2.org/2020/12/09/the-icc-prosecutors-final-report-on-the-afghanistan-uk-investigation-concerns-over-complementarity-and-the-courts-future-legitimacy/>> (Last accessed 15 May 2021)

⁵⁶ Burke-White (n 44) 71

⁵⁷ *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), para 134

⁵⁸ *ibid* para 208

⁵⁹ *ibid* paras 212-214

⁶⁰ *Prosecutor v Gaddafi and Al-Senussi* (Decision on the admissibility of the case against Abdullah Al-Senussi) ICC-01/11-01/11-466-Red (11 October 2013), para 168

⁶¹ *ibid* para 309

⁶² *Prosecutor v Gaddafi and Al-Senussi* (Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi") ICC-01/11-01/11-547-Red (21 May 2014); *Prosecutor v Gaddafi and Al-Senussi* (Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi") ICC-01/11-01/11-565 (24 July 2014)

The decisions in these two Libya cases have been criticised for a number of reasons. The first of which is that the decisions were inconsistent: Jurdi argues that this was the case because the only material difference between *Gaddafi* and *Al-Senussi* was that Gaddafi was not in Libyan custody and Al-Senussi was.⁶³ The Pre-Trial Chamber does attempt to address this point in *Gaddafi* by stating that there were specific crimes in Libya that Gaddafi could not be charged with but Al-Senussi could because of Al-Senussi's formal role as the head of Libyan intelligence.⁶⁴ Additionally, the Appeals Chamber in *Gaddafi* stated that Libya had not satisfactorily proven that the Al-Senussi and Gaddafi cases were linked.⁶⁵ However, from the point of view of a State trying to emerge from a conflict and rebuild itself following the Gaddafi regime, it seems difficult to accept how seemingly opposite decisions can be reached in cases involving members of the same regime.

The second point relates to the matter of timing, and if this had been dealt with better, the problems with inconsistency in relation to the Libya cases may never have arisen. Akhavan argues that the ICC was forced to consider the progress made in the Gaddafi case on the basis of evidence provided to the court almost a year prior to Libya providing information in the Al-Senussi admissibility challenge, meaning that Libya was able to illustrate a more advanced case in respect of Al-Senussi than they were for Gaddafi.⁶⁶ Akhavan also states:

“global justice and local justice run on different schedules... They not only occupy differing time zones, one ahead of the other, but also differing conceptions of time. The ICC often arrives on the scene as the ambulance and trauma surgeon, while a national system, as next of kin must nurse the patient back to health at home in a prolonged convalescence.”⁶⁷

⁶³ Jurdi (n 6) 215

⁶⁴ *Gaddafi* Pre-Trial Chamber Decision (n 57) para 109

⁶⁵ *Gaddafi* Appeal Judgment (n 62) paras 103-08

⁶⁶ Akhavan (n 5) 1052

⁶⁷ *ibid* 1044

If the ICC is only interested in short-term progress that has been made, then it is difficult to imagine how investigatory processes alone could satisfy the principle of complementarity in all circumstances. However, to counter this point, the OTP has been subject to criticism for keeping preliminary examinations open too long before making a decision regarding whether to launch an investigation,⁶⁸ and for not completing its work in any State in the first 18 years of the Court's operation.⁶⁹ This suggests that speedy intervention in a situation may not be a significant priority for the OTP, and that determining whether a State has complied with the principle of complementarity may not be as simple as long at the level of investigative activity in a given period of time.

The final point in relation to the Libya cases is the role that due process played in ensuring that the *Gaddafi* case was admissible before the ICC in relation to the role played by the failure to ensure that Gaddafi had access to legal representation. This serves to show how the problems caused by inconsistency and timing are ultimately interlinked. Jurdi states that the ICC's Pre-Trial Chamber attempted to impose unrealistic judicial standards on Libya at a time when Libya's judiciary was 'trying to restore and strengthen its role after years of tyrannical marginalization and political interference.'⁷⁰

It is important to note that the status of the judicial system in Libya has proven difficult to remedy. For example, in the 2011 Freedom House *Freedom in the World Report* for Libya, it is stated that 'The judiciary as a whole remains subservient to the political leadership and regularly penalizes political dissent',⁷¹ but the 2017 Report states, 'By the end of 2016 the country's judicial system

⁶⁸ Independent Expert Review (n 39) para 706

⁶⁹ *ibid* para 686

⁷⁰ Jurdi (n 6) 213. Megret and Samson additionally argue that the ICC should 'only find a case admissible where the due process violations are such as to deprive a trial of its character as a trial' because it may provide encouragement for States to improve and develop their own justice systems: Frederic Megret and Marika Giles Samson, 'Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials' (2013) 11 *Journal of International Criminal Justice* 571, 587

⁷¹ Freedom House, *Freedom in the World 2011: The Annual Survey of Political Rights and Civil Liberties* (Rowman and Littlefield 2011), 396. This report covers Muammar Gaddafi's final year in power in Libya.

had essentially collapsed, with courts across the country nonfunctional and impunity widespread.⁷²

Therefore, whilst the ICC's expectation that Libya would not be able to resolve its problems in relation to securing a fair trial in the Gaddafi case was understandable, it also raises the difficult question to answer of why they decided not to proceed in the *Al-Senussi* case when the Pre-Trial Chamber stated that 'it appears that Mr Al-Senussi's right to legal representation has been primarily prejudiced by the security situation in the country'.⁷³ The Libya case therefore serves as an example of why the OTP should take a flexible approach regarding the potential timing of any investigation in order to ensure a consistent prosecutorial approach, and to provide States with the opportunity to try and address past crimes themselves.

2. The Relationship between International and Ordinary Crimes

The importance of the distinction between so-called ordinary (crimes as defined under domestic law) and international crimes in relation to the principle of complementarity cannot be diminished as the subject attracted considerable complaints during the negotiation process for what would become the Rome Statute. In Article 42(2)(a) of the original International Law Commission Draft Statute for the ICC, it was stated that a person who has already been tried could be retried by the ICC if 'the acts in question were characterised by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court'.⁷⁴ This follows the position set out in the Statutes for the ICTY and ICTR.⁷⁵ This provision was ultimately not included in the final version of the Rome Statute as a number of States objected to the inclusion of such a clause in the Ad-Hoc Committee, the United Kingdom, for example, stated:

⁷² Freedom House, *Freedom in the World 2017: The Annual Survey of Political Rights and Civil Liberties* (Rowman and Littlefield 2017), 310. A similar statement is made in the 2020 Freedom House Report: Freedom House, 'Freedom in the World 2020: Libya' <<https://freedomhouse.org/country/libya/freedom-world/2020>> (Last accessed 15 May 2021)

⁷³ *Al-Senussi* Pre-Trial Chamber Decision (n 60) para 292

⁷⁴ International Law Commission (n 8) 57

⁷⁵ ICTY Statute (n 11) Article 9(2)(a); ICTR Statute (n 11) Article 8(2)(a)

‘The United Kingdom suggests that the distinction between ordinary crimes and international criminal court crimes is not appropriate, nor that it is appropriate for the international court, as a court of last resort, to retry individuals in the circumstances envisaged in Article 42(2)(a).’⁷⁶

The distinction between international and ordinary crimes is important to the work that is to be carried out in this study, as the US, has not implemented the Rome Statute into federal law. In such circumstances, prosecutions for ordinary crimes therefore appear more likely.⁷⁷ Additionally, in relation to the UK, information recently disclosed by the Ministry of Defence revealed that there has only been one prosecution under the International Criminal Court Act 2001 for offences committed in Iraq.⁷⁸ This demonstrates that the distinction between ordinary and international crimes is important in the context of the situations to be examined in this research as prosecutions have been carried out for both types of crimes.

Furthermore, it must be recognised that it will not be possible for the ICC or States to prosecute all offences which may constitute violations of international criminal law. For example, a 2004 report published by the United Nations Secretary-General stated that:

“in post-conflict countries, the vast majority of perpetrators of serious violations of human rights and international humanitarian law will never be tried, whether internationally or domestically. As such, prosecutorial policy must be strategic, based on clear criteria, and take account of the social context.”⁷⁹

⁷⁶ United Kingdom Mission to the United Nations, ‘Summary of observations made by the Representative of the United Kingdom of Great Britain and Northern Ireland on 3, 4, 5, 6 and 7 April 1995’ <<http://www.legal-tools.org/doc/664ac1/pdf>> (Last accessed 15 May 2021) 9

⁷⁷ Chapter Two will discuss the US implementation of the offences of torture and war crimes.

⁷⁸ Ministry of Defence, ‘Letter, dated 3 November 2020, to Roseanne Burke, CEASEFIRE’, available at <https://www.ceasefire.org/wp-content/uploads/2020/12/FOI2020_06821-Response-V2.pdf> (Last accessed 15 May 2021)

⁷⁹ United Nations Security Council, ‘The rule of law and transitional justice in conflict and post-conflict societies’ (23 August 2004) UN Doc S/2004/616, para 46

In the ICC context, the OTP has realised since the establishment of the Court that they do not have the capacity to prosecute all violations of international criminal law.⁸⁰ This was also acknowledged in the Independent Expert Review of the ICC.⁸¹ This argument was also utilised by the Pre-Trial Chamber in the Afghanistan admissibility decision as part of their justification for why an investigation relating to the situation in Afghanistan would not be in the interests of justice.⁸²

For the purposes of assessing whether a State has complied with the principle of complementarity, the OTP should therefore assess the rationale of a State's prosecutorial policy in relation to alleged violations of international criminal law, rather than necessarily whether prosecutions for specific offences under international law have taken place. This is particularly important since events organised under the auspices of the ICC Assembly of States Parties have seen the OTP criticised for adopting a complementarity policy based on the interests of the Court, rather than on the challenges faced by States.⁸³ There is also such a need to focus on the actual practice of States because the desire of States expressed at the Rome Conference was that the ICC was not meant to be the primary means of ensuring accountability for international crimes. For example, the French Minister of Foreign Affairs, Hubert Vedrine stated:

“My country supports the idea that complementarity should be at the heart of the Court's statute. We would be taking the wrong road if, as a result of the creation of the Court, States and national courts were to relinquish their primary responsibility for prosecuting the most heinous crimes. The Court should have to intervene – on its own initiative or on

⁸⁰ Office of the Prosecutor (n 7) 3

⁸¹ Independent Expert Review (n 39) paras 642-44

⁸² *Situation in the Islamic Republic of Afghanistan* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17-33 (12 April 2019), para 95

⁸³ Secretariat of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 'Informal information session – 24 June 2020: Complementarity and the relationship between national jurisdictions and the Court' (ICC Assembly of States Parties, 24 July 2020) <https://asp.icc-cpi.int/en_menus/asp/complementarity/Documents/Complementarity1%20Summary%2024Jul2020%201700.pdf> (Last accessed 25 July 2021)

request – only in the event or on request – only in the event of a deliberate or involuntary failure on the part of national authorities, when States are no longer able to try those responsible, or when they seek to protect them, especially by using delaying tactics.”⁸⁴

The Canadian Minister of Foreign Affairs Lloyd Axworthy additionally stated:

“The principle of “complementarity” ensures that the Court will only exercise jurisdiction where national systems are unable or unwilling to prosecute transgressors. ICC jurisdiction will not apply when a state genuinely investigates and prosecute those responsible for serious crimes. It will be in a sense a court of last resort – a final bulwark to ensure that those who commit heinous crimes do not go unpunished.”⁸⁵

The fact that this Chapter has illustrated numerous instances where the OTP has been criticised for its prosecutorial policy serves to highlight that the

⁸⁴ Hubert Vedrine, ‘Statement by Mr. Hubert Vedrine, Minister of Foreign Affairs of the French Republic’ (Legal Tools, 17 June 1998) <<https://www.legal-tools.org/doc/21cb8a/pdf>> (Last accessed 25 July 2021)

⁸⁵ Lloyd Axworthy, ‘Notes for an Address by the Honourable Lloyd Axworthy Minister of Foreign Affairs, Canada’ (Legal Tools, 15 June 1998) <<https://www.legal-tools.org/doc/7313d2/pdf>> (Last accessed 25 July 2021). For further examples of states supporting the notion that the ICC should only be able to intervene where States are unwilling or unable to do so themselves, see: Gabriele Gatti, ‘Speech of His Excellency Gabriele Gatti Secretary of State for Foreign Affairs of the Republic of San Marino’ (Legal Tools, 17 June 1998) <<https://www.legal-tools.org/doc/379316/pdf>> (Last accessed 25 July 2021); Lamberto Dini, ‘Statement by H.E. Mr. Lamberto Dini, Minister of Foreign Affairs of the Republic of Italy’ (Legal Tools, 14 July 1998) <<https://www.legal-tools.org/doc/4b9698/pdf>> (Last accessed 25 July 2021); Amos Wako, ‘Statement Delivered by Hon. S. Amos Wako Attorney-General of the Republic of Kenya’ (Legal Tools, 16 June 1998) <<https://www.legal-tools.org/doc/417f4a/pdf>> (Last accessed 25 July 2021); Boris Frlec, ‘Statement by H.E. Dr Boris Frlec, Minister of Foreign Affairs of the Republic of Slovenia at the Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, 15 June 1998 in Rome’ (Legal Tools, 15 June 1998) <<https://www.legal-tools.org/doc/f29d1f/pdf>> (Last accessed 25 July 2021); Frank Jensen, ‘Statement by H.E. Mr. Frank Jensen, Minister of Justice of Denmark’ (Legal Tools, 18 June 1998) <<https://www.legal-tools.org/doc/a1ae64/pdf>> (Last accessed 25 July 2021); Peter Chkheidze, ‘Statement by H.E. Dr. Peter Chkheidze, Permanent Representative of Georgia to the United Nations’ (Legal Tools, 18 June 1998) <<https://www.legal-tools.org/doc/bd8b14/pdf>> (Last accessed 25 July 2021); Tarja Halonen, ‘Statement by H.E. Ms Tarja Halonen Minister for Foreign Affairs Finland at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court’ (Legal Tools, 17 June 1998) <<https://www.legal-tools.org/doc/41c929/pdf>> (Last accessed 25 July 2021), and; Hisashi Owada, ‘Statement by H.E. Mr. Hisashi Owada Head of Delegation of Japan to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court’ (Legal Tools, 15 June 1998) <<https://www.legal-tools.org/doc/d38f53/pdf>> (Last accessed 25 July 2021)

principle of complementarity is not operating as envisaged at the Rome Conference. Therefore, there is a clear need for the Court to give greater consideration to State practice, especially in light of the OTP admitting that it does not have the resources to prosecute all international crimes. The remainder of this section will therefore examine the relationship between ordinary and international crimes at the ICC, as despite the Rome Statute including no reference to ordinary crimes, a debate continues in this area. This discussion will also extend to the application of defences, with reference to the situation in the UK.

a. Crimes

Whilst Kleffner points out it is unclear exactly to what extent the crimes found within the Rome Statute have to be implemented at the domestic level,⁸⁶ it is clear that commentators agree that some form of implementation of Rome Statute crimes is required for States to be able to fulfil their obligations under the principle of complementarity.⁸⁷ Stahn, for example, states:

“The complementarity test under Article 17 provides an incentive for States to enact implementing legislation which allows effective investigations and prosecutions at the domestic level. The very existence of complementarity has thus an impact on the repression of crimes under domestic criminal jurisdiction.”⁸⁸

This means that States have had to take measures to implement the Rome Statute into their domestic systems. Terracino states that whilst some States, such as the United Kingdom, have decided to implement the definitions of crimes under the Rome Statute directly into domestic law,⁸⁹ other States such

⁸⁶ Jann K Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’ (2003) 1(1) *Journal of International Criminal Justice* 86, 90-94

⁸⁷ For example, Harmen van der Wilt, ‘Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court’ (2008) 8 *International Criminal Law Review* 229, 230; *ibid* 94, and Julio Bacio Terracino, ‘National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC’ (2007) 5 *Journal of International Criminal Justice* 421, 422

⁸⁸ Stahn (n 53) 92

⁸⁹ Terracino (n 87) 423-24

as France and Ecuador took a broader approach to the ICC in relation to genocide,⁹⁰ Bosnia and Herzegovina to war crimes,⁹¹ and the DRC and Ecuador to crimes against humanity.⁹² However, Terracino also points out that Bosnia and Herzegovina chose not to implement a clause on child conscription into their Criminal Code, despite its inclusion in the Rome Statute.⁹³

Under the principle of state sovereignty, States are able to exercise their legal powers as they choose to do so.⁹⁴ Van der Wilt argues that it would be impossible to impose a uniform approach to all States, as the nature of crimes would be different depending on the location and circumstances they take place in.⁹⁵ The ICC may therefore have to accept that States take a different approach to legislation depending on their circumstances, meaning that sometimes they will be forced to accept a situation that is considered to be less than perfect. Additionally, as shown in the last section on primacy, any attempt by the ICC to assert jurisdiction on the basis of differences between offences on the domestic and international levels may be met with resistance from States.

However, the argument does still exist as to whether a decision by a State to prosecute for ordinary crimes as opposed to their international counterparts constitutes a failure of the State to comply with the principle of complementarity. This is an important issue as high-profile prosecutions for ordinary crimes that have previously taken place may not meet the ICC's definitions of crimes. Heaphy and Pittman, for example, state that this would be the case with regards to the prosecution of William Calley for murder in relation to his involvement in the My Lai massacre as the elements of this crime were substantially different to the closest crime in the Rome Statute of wilful killing.⁹⁶

⁹⁰ *ibid* 425

⁹¹ *ibid* 424

⁹² *ibid* 425

⁹³ *ibid* 426

⁹⁴ See for example, United Nations General Assembly Resolution 375 (IV) (6 December 1949), annex Article 1.

⁹⁵ van der Wilt (n 87) 270-71

⁹⁶ Thomas Wayde Pittman and Matthew Heaphy, 'Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity before the International Criminal Court' (2008) 21 *Leiden Journal of International Law* 165, 178-79

It has been suggested that the potential for ICC jurisdiction will only arise in States where ordinary crimes are relied upon in circumstances where no crime exists that adequately encompasses the conduct subject to examination by the OTP.⁹⁷ The ICC did, however, address this issue in the case of *Gaddafi*, where the Pre-Trial Chamber stated that ‘a domestic investigation or prosecution for “ordinary crimes”, to the extent that the case covers the same conduct, shall be considered sufficient’,⁹⁸ before going on to state that Gaddafi was being investigated for different conduct than the ICC was indicting him for.⁹⁹

Whilst this may address the problem of what happens if a State lacks the legislation that could prevent a prosecution from taking place for an international crime, it does not address the extent to which a State choosing to not prosecute for an international crime when it was capable to do so has breached the principle of complementarity. When emerging from a conflict, a State may choose to prosecute individuals for what could be perceived as lesser crimes, or even not to prosecute them at all. For example, a United Nations Report noted that during negotiations between the Colombian government and the FARC, the parties refused to allow for heavy punishments for FARC leaders, as ‘it would be unrealistic to expect guerrilla leaders to negotiate their own incarceration and reiterating that the essence of a political settlement was to ensure that the armed group was able to make the transition from armed conflict to politics.’¹⁰⁰ Additionally, in 2010, the President of the ICTY Patrick Robinson in 2010 stated, ‘the Tribunal cannot, through the rendering of its judgements alone, bring peace and reconciliation to the region: other remedies should complement the criminal trials if lasting peace is to be achieved’.¹⁰¹ This means that the ICC seriously

⁹⁷ Ahmed Samir Hassanein, ‘Physical and Legal Inability under Article 17(3) of the Rome Statute’ (2015) 15 International Criminal Law Review 101, 116-17; Kleffner (n 86) 96-97

⁹⁸ *Gaddafi* Pre-Trial Chamber Decision (n 57) para 88. See also para 108

⁹⁹ *ibid* para 113

¹⁰⁰ United Nations Security Council, ‘Report of the Secretary-General on the United Nations Mission in Colombia’ (23 December 2016) UN Doc S/2016/1095, para 11

¹⁰¹ United Nations Security Council, ‘Letter dated 1 November 2010 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council’ (19 November 2010) UN Doc S/2010/588, Annex I para 78.

needs to consider the context in which prosecutions occur, and whether intervention will promote or undermine the goals of international criminal justice.

b. Defences under National Law

Another factor which complicates the process of implementing international law domestically is the application of defences, as the transition between defences at the international level and the domestic level may have unintended consequences, which show that there are clear distinctions in the operation of the law at the national and international levels. This can be seen in the UK, as Cryer and Bekou state that because the International Criminal Court Act 2001 relies upon domestic defences, the defence of duress is available for international crimes.¹⁰² Cryer states that the defence will not apply to international crimes involving murder due to the judgment of the House of Lords in *Howe*.¹⁰³ This is a position which seems to reflect international criminal law, as the ICTY rejected the defence of duress to crimes against humanity in *Erdemović*.¹⁰⁴ It is questionable though, based on the rationale behind the judgment in *Howe*, whether the defence should apply to international crimes at all. For example, in the course of his judgment justifying why duress should not be a defence to murder, Lord Griffiths stated:

“We face a rising tide of violence and terrorism against which the law must stand firm recognising that its highest duty is to protect the freedom and lives of those that live under it. The sanctity of human life lies at the root of this ideal and I would do nothing to undermine it, be it ever so slight.”¹⁰⁵

¹⁰² Robert Cryer and Olympia Bekou, ‘International Crimes and ICC Cooperation in England and Wales’ (2007) 5 *Journal of International Criminal Justice* 441, 447

¹⁰³ Robert Cryer, ‘Implementation of the International Criminal Court Statute in England and Wales’ (2002) 51(3) *International and Comparative Law Quarterly* 733, 740; *R v Howe* [1987] 1 AC 417

¹⁰⁴ *Prosecutor v Erdemović* (Judgement) IT-96-22-A (7 October 1997), para 19

¹⁰⁵ *Howe* (n 103) 443-44

Based on these comments, it is difficult to see how duress could possibly apply in English law to what the Rome Statute states are ‘the most serious crimes of concern to the international community as a whole’.¹⁰⁶

The potential availability of defences may, however, justify why a State such as the UK may choose to decide to not pursue a prosecution for an international crime even where such a crime has been committed. Under Article 17(1)(b) of the Rome Statute, the ICC is unable to assert jurisdiction in situations where:

“The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.”¹⁰⁷

In the context of prosecutions in England, the Full Code Test (FCT) states that prosecutors as part of their determination of whether there is ‘a realistic prospect of conviction’ consider the potential impact of any defences throughout the prosecution process.¹⁰⁸ The FCT additionally states that ‘a case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.’¹⁰⁹ In the absence of prosecutions, States may choose to pursue other measures not involving prosecution, which may allow the truth to be discovered, and ensure that there is some sense of accountability for acts that have been committed.¹¹⁰

3. The ICC and Alternative Investigation Mechanisms

During the plenary debates at the 1998 Diplomatic Conference in Rome, Afghanistan urged States to leave open the possibility of accepting alternatives

¹⁰⁶ Rome Statute (n 1) Preamble

¹⁰⁷ *ibid* Article 17(1)(b)

¹⁰⁸ Crown Prosecution Service, ‘The Code for Crown Prosecutors’ (Crown Prosecution Service, 26 October 2018) <<https://www.cps.gov.uk/publication/code-crown-prosecutors>> (Last accessed 15 May 2021), para 4.7

¹⁰⁹ *ibid* para 4.6

¹¹⁰ To this end, Chapter Three will explore non-criminal investigations conducted by the United States Senate. Chapter Six will explore the exploration of non-criminal measures in the UK in the context of the Baha Mousa Report.

to prosecution when a State has decided that it is better to simply move on from any past crimes that have been committed.¹¹¹ However, in their policy paper on the interests of justice published in 2007, the OTP state that:

“In relation to other forms of justice decided at the local level, the Office of the Prosecutor reiterates the need to integrate different approaches. All approaches can be complementary... The pursuit of criminal justice provides one part of the necessary response to serious crimes of international concern which, by itself may prove to be insufficient as the Office is conducting focused investigations and prosecutions. As such, it fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice.”¹¹²

The OTP position that the use of alternative justice mechanisms are something that should take place alongside criminal investigation processes comes even though an informal experts paper published in 2003 states that ‘mechanisms other than prosecution for dealing with past abuses, including alternative forms of justice, may raise difficult questions for the OTP in interpreting its role and mandate’.¹¹³ The paper also stated that ‘past experience demonstrates that it would be arduous to attempt to develop a general doctrine on how to assess such situations. One must be alert to different contexts, including political, cultural, society-related and other factors’.¹¹⁴ It should, however, be noted that the OTP’s position has received judicial backing from the Pre-Trial Chamber in the Burundi admissibility decision, in which it was stated that ‘national

¹¹¹ United Nations General Assembly (n 16) 87 and 128

¹¹² Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’ (International Criminal Court, September 2007) <<https://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestsofjustice.pdf>> (Last accessed 15 May 2021), 7-8. See also at 9 where the OTP state that ‘a decision not to proceed on the basis of the interests of justice should be understood as a course of last resort’.

¹¹³ Office of the Prosecutor, ‘Informal expert paper: The principle of complementarity in practice’ (International Criminal Court, 2003) <<https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>> (Last accessed 15 May 2021), para 72

¹¹⁴ *ibid* para 74

investigations that are not designed to result in criminal prosecutions do not meet the admissibility requirements under article 17(1) of the Statute.¹¹⁵

Scepticism surrounding the use of alternative justice mechanisms is understandable. Despite Gibson's assertion in 2006 that the South African Truth and Reconciliation Commission was a factor in South Africa maintaining a stable democracy,¹¹⁶ other processes have not necessarily fared as well. For example, Roht-Arriaza states that the Rettig Commission was forced to sacrifice justice in order to obtain the truth about what had happened during the Pinochet regime.¹¹⁷

This section will discuss the role of amnesties and truth commissions before discussing the need for clarity regarding the acceptability of non-criminal investigations under the principle of complementarity. This discussion is necessary to assess whether the non-judicial, non-criminal investigations to be discussed in later chapters can demonstrate that the United States and United Kingdom have complied with the principle of complementarity. Such an analysis is also essential because there is a need to consider more than just criminal prosecutions when discussing whether a State has sought to achieve a sense of justice for past wrongdoing. For example, in their 2004 Report on the rule of law and transitional justice, the UN Secretary-General stated that:

“the international community has rushed to prescribe a particular formula for transitional justice, emphasizing either criminal prosecutions or truth-telling without first affording victims and national constituencies the opportunity to consider and decide on the proper balance. The international community must see transitional justice in a way that extends well beyond courts and tribunals. The challenges of post-conflict environments necessitate an approach that balances a variety of goals,

¹¹⁵ *Situation in the Republic of Burundi* (Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Republic of Burundi”) ICC-01/17-9-Red (9 November 2017), para 152

¹¹⁶ James L Gibson, ‘The Contributions of Truth to Reconciliation: Lessons from South Africa’ (2006) 50(3) *Journal of Conflict Resolution* 409, 410

¹¹⁷ Naomi Roht-Arriaza, ‘Truth Commissions and Amnesties in Latin America: The Second Generation’ (1998) 92 *American Society of International Law Proceedings* 313, 313

including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law.”¹¹⁸

Additionally, a document published in 2013 by the High Representative of the European Union for Foreign Affairs and Security Policy states that:

“Effective prosecution strategies for large-scale crimes often focus on the planners and organizers of crimes, rather than those of lower rank or responsibility. Therefore prosecutions cannot achieve meaningful justice in isolation. Implementing prosecution strategies with other initiatives, such as reparations programmes for victims, reconciliation and institutional reform – including vetting procedures and truth-seeking – can help fill the impunity gap by addressing crimes with large numbers of victims and perpetrators.”¹¹⁹

This means that there is a clear need for an institution such as the ICC to consider a wider variety of mechanisms when deciding whether to launch an investigation since States have to juggle a wide range of competing interests in the aftermath of an armed conflict.

a. Amnesties

Stahn argues that a State which decides to impose an amnesty for crimes within the Rome Statute may have indicated that it was unwilling to prosecute, despite their obligations under Article 17(1) of the Rome Statute.¹²⁰ Following the creation of the Rome Statute, Dugard stated that ‘Amnesty is no longer

¹¹⁸ United Nations Security Council (n 79), para 25

¹¹⁹ High Representative of the European Union for Foreign Affairs and Security Policy, ‘Toolkit for Bridging the gap between international and national justice’ (European Commission, 31 January 2013) <<https://data.consilium.europa.eu/doc/document/ST-6783-2013-INIT/en/pdf>> (Last accessed 25 July 2021), 12

¹²⁰ Carsten Stahn, ‘Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court’ (2005) 3 *Journal of International Criminal Justice* 695, 703

accepted as the natural price for transition from repression to democracy'.¹²¹ This is a trend illustrated by Roht-Arriaza who highlighted that in Latin America, States have been able to overcome past amnesty laws to pursue prosecutions.¹²²

However, Dugard states that the failure of the Rome Statute to include a provision on amnesties 'allows prosecutions to proceed where they will not impede peace, but at the same time permits societies to 'trade' amnesty for peace where there is no alternative'.¹²³ Stahn, however, argues that blanket amnesties would not be allowed under the Rome Statute as, 'an amnesty law which impedes prosecution or which does not provide for an investigation cannot be invoked as a bar to ICC proceedings, because it does not even meet the basic requirements for inadmissibility under Article 17(1)(a) or (b)'.¹²⁴

The issue of amnesties is not one which has disappeared however, as despite Stahn's assertion that allowing amnesties runs contrary to the notion that by choosing to join the ICC, States have recognised that individuals should be held responsible for their actions,¹²⁵ States still employ amnesty laws. The Colombian Peace Agreement, for example, includes an amnesty provision which grants 'the broadest possible amnesty',¹²⁶ and covers a wide range of crimes.¹²⁷ The Agreement does, however, exclude specifically amnesties for crimes that are within the scope of the Rome Statute,¹²⁸ a fact which was welcomed by the ICC Prosecutor Fatou Bensouda.¹²⁹ This may be a fact that is

¹²¹ John Dugard, 'Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law* 1001, 1001

¹²² Naomi Roht-Arriaza, 'Just a Bubble? Perspectives on the Enforcement of International Criminal Law by National Courts' (2013) 11 *Journal of International Criminal Justice* 537, 538-39.

¹²³ Dugard (n 121) 1015

¹²⁴ Stahn (n 120) 709

¹²⁵ *ibid* 705

¹²⁶ United Nations Security Council, 'Letter Dated 29 March 2017 from the Secretary-General addressed to the President of the Security Council' (21 April 2017) UN Doc S/2017/272, 127

¹²⁷ *ibid* 257

¹²⁸ *ibid* 127

¹²⁹ International Criminal Court, 'Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army' (International Criminal Court, 1 September 2016) <<https://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia>> (Last accessed 15 May 2021)

reconcilable with the purposes of the Rome Statute though, as Stahn argues that Article 17(1)(d) of the Rome Statute's gravity requirement means that a difference can be drawn between amnesties being granted to those most responsible for international crimes and others who may also have been involved in such action.¹³⁰

It may be the case that amnesties do play an important role in ensuring peace and security, as Arsanjani states that 'amnesties have sometimes been a critical component of a package for reaching settlement in a divided state'.¹³¹ It therefore must be asked whether an alternative approach to ICC jurisdiction would help to ensure that there is some sense of accountability for past actions, as ICC intervention has been subject to critique. This is illustrated by the case of Uganda, where Schabas and Ssenyonjo highlight that the ICC's presence may have acted as an impediment to peace talks being brought to a successful conclusion,¹³² though they do credit the ICC's issuance of arrest warrants with initiating peace talks.¹³³ Additionally, Schabas argues that there are circumstances where a desire to continue with criminal prosecutions may lead to the extension of an armed conflict,¹³⁴ an accusation which the ICC has faced in the Côte d'Ivoire.¹³⁵

However, in their discussion of the UK's Overseas Operations (Service Personnel and Veterans) Bill, the OTP refer to the Bill as potentially applying an amnesty for crimes committed by UK forces in Iraq,¹³⁶ and state that amnesties run contrary to international law.¹³⁷ This suggests that the OTP is as yet unwilling to accept the application of amnesties for Rome Statute crimes. There

¹³⁰ Stahn (n 120) 707

¹³¹ Mahnoush H Arsanjani, 'The International Criminal Court and National Amnesty Laws' (1999) 93 *American Society of International Law Proceedings* 65, 65

¹³² Manisuli Ssenyonjo, 'The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty?' (2007) 7 *International Criminal Law Review* 361, 369-70; William A Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts' (2008) 19 *Criminal Law Forum* 5, 20-22.

¹³³ Ssenyonjo (n 132) 373; Schabas (n 132) 19-20

¹³⁴ Schabas (n 132) 22

¹³⁵ McGovern (n 4)

¹³⁶ Office of the Prosecutor, 'Situation in Iraq/UK: Final Report' (Office of the Prosecutor, 9 December 2020) <<https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>> (Last accessed 15 May 2021), para 489

¹³⁷ *ibid* para 478

has, however, been limited ICC jurisprudence addressing the issue of amnesties, with the Appeals Chamber determining in the *Gaddafi* case that the amnesty which was the focus of the admissibility challenge did not apply to Gaddafi.¹³⁸ The Court additionally stated in this March 2020 judgment that ‘For present purposes, it suffices to say only that international law is still in the developmental stage on the question of amnesties’.¹³⁹ Close states that it would have been ‘imprudent’ for the Appeals Chamber to assess the applicability of amnesties any further.¹⁴⁰

b. Truth Commissions

Stahn states that truth commissions serve several purposes: they enable States to be able to compile a more comprehensive range of past wrongdoings than may be possible through the criminal trial process,¹⁴¹ provide an opportunity to hear the voice of victims,¹⁴² and ensure that those who committed crimes are held to account.¹⁴³ It is, however, still unclear whether the use of truth commissions is compatible with the principle of complementarity. A 2006 document on truth commissions published by the United Nations High Commissioner for Human Rights states that the ICC’s response to the establishment of a truth commission ‘is likely to be determined by whether there appears to be an intent to follow such a truth commission inquiry with judicial action, rather than to close the possibility of prosecution through the establishment of a non-judicial inquiry’.¹⁴⁴

¹³⁸ *Prosecutor v Saif Al-Islam Gaddafi* (Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled ‘Decision on the “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute”’ of 5 April 2019) ICC-01/11-01/11-695 (9 March 2020), paras 86-94

¹³⁹ *ibid* para 96

¹⁴⁰ Josepha Close, ‘The ICC refrains from affirming a general ban on amnesties in the Gaddafi admissibility decision’ (International Law Blog, 20 April 2020)

<<https://internationallaw.blog/2020/04/20/the-icc-refrains-from-affirming-a-general-ban-on-amnesties-in-the-gaddafi-admissibility-appeal-decision/>> (Last accessed 15 May 2021)

¹⁴¹ Carsten Stahn, ‘Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor’ (2001) 95 *American Journal of International Law* 952, 954

¹⁴² *ibid*

¹⁴³ *ibid*

¹⁴⁴ Office of the High Commissioner for Human Rights, ‘Rule-of-Law Tools for Post-Conflict States: Truth Commissions’ (2006) UN Doc HR/PUB/06/1, 27-28

Robinson argues that the key to determining whether truth commissions can be used as an alternative to prosecution will depend upon the powers available to the truth commission, such as whether it has the power to allow amnesties, and whether options such as prosecution have been considered instead of or alongside the commission.¹⁴⁵ Robinson, however, states that that it is unlikely that a process which introduces a blanket amnesty would be acceptable.¹⁴⁶ Additionally, Seibert-Fohr argues that if Article 17 of the Rome Statute required criminal investigations, 'this would exclude only a truth commission mechanism that generally provides for criminal impunity independent of the outcome of the investigation.'¹⁴⁷ Seibert-Fohr additionally argues that the scope of Article 17 was never designed to ensure that investigations carried out had to be exclusively criminal in nature,¹⁴⁸ and that as long as a State can prove that any decision to not prosecute in a situation where a truth commission was established to ensure peace, such a mechanism should satisfy the principle of complementarity if the commission does ensure that there is accountability.¹⁴⁹

Any move which may serve to undermine the validity of the use of truth commissions may serve to limit their effectiveness as Bisset argues that truth commissions may no longer be able to receive confidential information if this could then be requested by the ICC for use in a prosecution.¹⁵⁰ Bisset additionally argues that the right to a fair trial may be jeopardised if self-incriminating evidence submitted by an individual to a truth commission has to be handed to the ICC for use in a prosecution.¹⁵¹ This means that the issue of truth commissions may not be just about attempting to ensure peace, but also about protecting the rights of those who give evidence.

¹⁴⁵ Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14(3) *European Journal of International Law* 481, 499-502

¹⁴⁶ *ibid* 501

¹⁴⁷ Anja Seibert-Fohr, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions' (2003) 7 *Max Planck Yearbook of United Nations Law* 553, 568

¹⁴⁸ *ibid* 569

¹⁴⁹ *ibid* 570-72

¹⁵⁰ Alison Bisset, 'Rethinking the Powers of Truth Commissions in Light of the ICC Statute' (2009) 7 *Journal of International Criminal Justice* 963, 974

¹⁵¹ *ibid* 979

c. A Need for Clarity Regarding Non-Criminal Investigations

The Pre-Trial Chamber appears to have made it clear that complementarity can only be satisfied by a criminal investigation process, stating in the Burundi admissibility decision that:

“the Chamber considers that a national investigation merely aimed at the gathering of evidence does not lead, in principle, to the inadmissibility of any cases before the Court, considering that, for the purposes of complementarity, an investigation must be carried out with a view to conducting criminal prosecutions... national investigations that are not designed to result in criminal prosecutions do not meet the admissibility requirements under article 17(1) of the Statute.”¹⁵²

Further clarity on the acceptability of non-criminal investigation processes would be welcomed since the United Nations encourages States to engage in non-criminal processes. For example, in 2014, the Office of the High Commissioner for Human Rights welcomed the establishment of such a commission in Tunisia.¹⁵³ Additionally, in the context of the UK, the United Nations Torture Committee has encouraged the UK to launch an overarching inquiry to examine allegations of mistreatment against Iraqi civilians.¹⁵⁴

Furthermore, when encouraging States to ratify the Rome Statute, UN Secretary-General Kofi Annan stated in September 1998 that:

“It is inconceivable that... the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future. Some people seem to

¹⁵² Burundi admissibility decision (n 115) para 152

¹⁵³ United Nations, ‘Upcoming launch of truth commission hailed by UN as ‘step forward’ for Tunisia’ (United Nations, 6 June 2014) <<https://news.un.org/en/story/2014/06/470112-upcoming-launch-truth-commission-hailed-un-step-forward-tunisia>> (Last accessed 15 May 2021)

¹⁵⁴ United Nations Committee against Torture, ‘Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’ (7 June 2019) UN Doc CAT/C/GBR/CO/6, para 33

imagine this Court will be composed of frivolous or malicious people, roaming the world in search of opportunities to undermine a peace process here, or prosecute a peacekeeper there. Nothing could be more improbable.”¹⁵⁵

In circumstances where States are acting in a manner endorsed by an international body such as the UN, it would be difficult to justify an OTP strategy involving the pursuit of prosecutions. This further serves to show that when considering State compliance with the principle of complementarity, the OTP should consider more than just prosecutorial activity.

There is also a need to consider the actual practices of States when assessing compliance with the principle of complementarity. For example, as will be demonstrated in Chapters Three and Six, the use of non-criminal investigations has been a major element of the responses of the United States of America and the United Kingdom to allegations of war crimes. In the case of the United Kingdom, it may be possible to argue that there is a public policy justification for not prosecuting lower-ranking personnel for alleged criminal misconduct based on the fact the Baha Mousa Inquiry found at the start of the armed conflict in Iraq, ‘there was no proper MoD-endorsed doctrine on interrogation of prisoners of war that was generally available. The proper limits of interrogation had become confined to teaching materials at Chicksands’.¹⁵⁶ Combined with the fact that the UK took steps to enact institutional reforms to ensure that abuses such as those in Iraq did not recur,¹⁵⁷ and a finding by the OTP that the UK had investigated the responsibility of higher-ranking officials,¹⁵⁸ it may be possible to argue that the UK has complied with the principle of complementarity.

¹⁵⁵ United Nations, ‘Secretary-General Urges ‘Like-Minded’ States to Ratify Statute of International Criminal Court’ (United Nations, 1 September 1998) <<https://www.un.org/press/en/1998/19980901.sgsm6686.html>> (Last accessed 25 July 2021)

¹⁵⁶ Sir William Gage, *The Report of the Baha Mousa Inquiry: Volume II* (2011-2012, HC 1452-II), para 5.149. The Report further highlighted at para 6.66 that training materials also ‘did not provide any detailed guidance on prisoner handling and the treatment of civilian detainees’.

¹⁵⁷ See *infra* 216-19

¹⁵⁸ OTP Final Report (n 136) para 191

This is something that has to be assessed on a case-by-case basis, however, as the findings of non-criminal investigations may also serve to demonstrate why further criminal investigations are necessary. This can be seen in the case of Australia where in advance of the publication of the Brereton Report, which found that members of Australian Defence Force were responsible for the unlawful killing of Afghan civilians,¹⁵⁹ the Australian government announced that allegations of criminal wrongdoing would be investigated.¹⁶⁰ In the case of the United States, it was decided that decisions not to prosecute individuals would not be revisited following the publication of the Senate Intelligence Committee's Report on the CIA's detention and interrogation program,¹⁶¹ even though President Obama acknowledged that:

“The report documents a troubling program involving enhanced interrogation techniques on terrorism suspects in secret facilities outside the United States, and it reinforces my long-held view that these harsh methods were not only inconsistent with our values as a nation, they did not serve our broader counterterrorism efforts or our national security interests. Moreover, these techniques did significant damage to America's standing in the world and made it harder to pursue our interests with allies and partners. That is why I will continue to use my authority as President to make sure we never resort to those methods again.”¹⁶²

¹⁵⁹ Christopher Knaus, 'Australian special forces involved in murder of 39 Afghan civilians, war crimes report alleges' (*The Guardian*, 19 November 2020) <<https://www.theguardian.com/australia-news/2020/nov/19/australian-special-forces-involved-in-of-39-afghan-civilians-war-crimes-report-alleges>> (Last accessed 25 July 2021). For discussion of the Report in the context of the obligation to investigate under international law, see Durward Johnson and Michael N Schmitt, 'The Duty to Investigate War Crimes' (Lieber Institute, 22 December 2020) <<https://lieber.westpoint.edu/duty-investigate-war-crimes/>> (Last accessed 25 July 2021)

¹⁶⁰ Andrew Greene, 'Special investigator appointed to prosecute Australian soldiers accused of Afghanistan war crimes' (ABC News, 12 November 2020) <<https://www.abc.net.au/news/2020-11-12/prime-minister-update-defence-war-crimes-report/12875570>> (Last accessed 25 July 2021)

¹⁶¹ Julian Hattam, 'DOJ won't reopen torture probe after CIA report' (The Hill, 10 December 2014) <<https://thehill.com/policy/defense/226603-justice-department-wont-reopen-torture-probes>> (Last accessed 15 May 2021)

¹⁶² White House, 'Statement by the President Report of the Senate Select Committee on Intelligence' (White House, 9 December 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/12/09/statement-president-report-senate-select-committee-intelligence>> (Last accessed 15 May 2021)

This serves to demonstrate that it is debateable that the United States has complied with the principle of complementarity.¹⁶³

In light of the OTP's longstanding acknowledgement that it does not have the investigative resources to prosecute every alleged international crime, the OTP should assess whether non-criminal processes pursued by States are indicative of a desire to address past wrongdoing or are indicative of a State unwilling or unable to take action. If use of a non-judicial process highlights that a State should take action to hold those responsible for past misconduct to account, and the State then fails to do so, the OTP would be more than justified to take action. If, however, a State does take action designed to hold those responsible for the perpetration of crimes to account and to ensure such crimes do not recur, it would be far more difficult to justify ICC intervention.

4. Conclusion

This Chapter has shown that there are a number of reasons why it may be incumbent upon the ICC to assess a wider range of State conduct when determining whether a State has complied with the principle of complementarity. The first reason, as shown in the section on the relationship between complementarity and primacy is that the ICC's interpretation of the Rome Statute may have given States the unintended impression that States are either incapable of prosecuting international crimes themselves, or may not be trusted to do so, despite Article 17(1) of the Rome Statute stating that the ICC could only assume jurisdiction over a case when a State was 'unwilling or unable to do so'.¹⁶⁴ The second major problem, as shown in the section examining the implementation of the Rome Statute into domestic law by States, is that the ability of States to prosecute international crimes is limited by the framework of their judicial system. It was also highlighted that States may choose, for public policy reasons, to use an alternative mechanism to ensure that there is some

¹⁶³ US compliance with the principle of complementarity will be discussed in Part Two.

¹⁶⁴ Rome Statute (n 1) Article 17(1)

sense of accountability for international crimes. The final major problem discovered in this Chapter, as shown in the final section, is that it is unclear whether the State can pursue non-criminal investigative mechanisms that it feels are in its best interests to prevent the recurrence of international crimes without potentially rendering cases admissible before the ICC. This is the case even though there is no reason, in principle, why such mechanisms do not comply with the principle of complementarity.

Part Two

Chapter Two: Criminal Law in the United States of America

This Chapter will discuss the law applicable to the subject matter of the investigations currently being carried out by the International Criminal Court (ICC) into the conduct of United States personnel in Afghanistan. This discussion of the scope of applicable law is necessary as Article 17 of the Rome Statute makes it clear that the ICC is able to assume jurisdiction in situations where a State is unwilling or unable to exercise jurisdiction themselves.¹ As discussed in the introduction to this thesis, the principle of complementarity provides a means through which the United States can avoid further ICC scrutiny.² In the *Gaddafi* Appeal Judgment, the Court stated if the Office of the Prosecutor (OTP) and a State are investigating the same offences, then any case before the ICC would be inadmissible.³ The Court also stated that in situations where OTP and State focus is different, an assessment of whether the State's investigatory process complies with the principle of complementarity will have to be determined on a case-by-case basis.⁴

As most of the evidence from which the OTP has based their allegations that US personnel have committed offences under the Rome Statute is not publicly available, this Chapter will focus on the extent to which the law dealing with specific offences alleged under the Rome Statute is compatible with offences found in US law (e.g. the crime of rape under the Rome Statute with sexual offences under US law). It is possible that this discussion exposes flaws in the legal framework of the United States may exist that limit them from discharging their obligations to carry out investigations or prosecutions. This may prevent

¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 17

² *supra* 4-5

³ *Prosecutor v Gaddafi and Al-Senussi* (Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi") ICC-01/11-01/11-547-Red (21 May 2014), para 72

⁴ *ibid*

the US from being able to conduct investigations or prosecutions in a manner that reflects the OTP's focus.⁵

This Chapter will include a discussion of both the law applicable to members of the armed forces, as found in the Uniform Code of Military Justice (UCMJ),⁶ and federal criminal law.⁷ This dual focus is necessary as the Office of the Prosecutor's request to open an investigation at the ICC in relation to the situation in Afghanistan makes it clear that their investigation will focus both on the conduct of the armed forces and the Central Intelligence Agency (CIA).⁸ The OTP's investigation request states that these alleged offences took place 'primarily in the period 2003-2004'.⁹ The offences to be examined include war crimes, torture and sexual offences.¹⁰

1. The War Crimes Act

In their request to investigate the conduct of US personnel in Afghanistan, the ICC allege that a number of war crimes in the context of a non-international armed conflict, as found in Article 8(2) of the Rome Statute,¹¹ were committed. It is therefore necessary to discuss the war crimes legislation that does exist within the United States and assess whether any potential prosecutions under this Act would satisfy the 'same conduct' test set out by the ICC in *Lubanga*.¹²

⁵ In the *Gaddafi* case, the Pre-Trial Chamber noted that 'it would not be appropriate to expect Libya's investigation to cover exactly the same acts of murder and persecution mentioned in the Article 58 Decision as constituting instances of Mr Gaddafi's alleged course of conduct. Instead, the chamber will assess whether the alleged domestic investigation addresses the same conduct underlying the Warrant of Arrest and Article 58 Decision': *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), para 83.

⁶ 10 US Code Ch 47

⁷ 18 US Code

⁸ *Situation in the Islamic Republic of Afghanistan* (Public redacted version of "Request for authorisation of an investigation pursuant to Article 15") ICC-02/17-7-Red (20 November 2017) 88-124

⁹ *ibid* para 189

¹⁰ For a discussion of a wider range of offences potentially applicable to US personnel, as well as potential defences, see Human Rights Watch, 'No More Excuses: A Roadmap to Justice for CIA Torture' (Human Rights Watch, 1 December 2015) <https://www.hrw.org/sites/default/files/report_pdf/us1215web.pdf> (Last accessed 15 May 2021), 35-96

¹¹ Rome Statute (n 1) Article 8(2); OTP Afghanistan investigations request (n 8) para 187.

¹² *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 (10 February 2006), para 31

This section is not designed to include a substantive discussion of all the crimes relevant to the OTP's investigation into alleged wrongdoing in Afghanistan, it is merely designed to provide an overview of the Act as a whole. Discussion of a selection of offences within the War Crimes Act that are relevant to the OTP's investigation into Afghanistan will be included within the sections to follow on sexual offences and torture.

The United States Congress has implemented war crimes legislation, which is now contained in Section 2441 of Title 18 of the United States Code.¹³ This legislation has been amended on multiple occasions, and because the last amendments, enacted as part of the Military Commissions Act of 2006,¹⁴ apply retroactively,¹⁵ it is necessary to state what conduct the legislation has prohibited under all its iterations. The initial version of the statute simply stated, 'Whoever, whether inside or outside the United States, commits a grave breach of the Geneva conventions... 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'.¹⁶

This brief definition of war crimes was expanded in 1997 to also include 'a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949',¹⁷ as well as other provisions in relation to issues such as booby-traps,¹⁸ and violations of Hague Convention IV.¹⁹ The second articulation of war crimes in United States law is important, as this is the version of the War Crimes Act that would have applied had any prosecutions been brought for war crimes prior to the implementation of the Military Commissions Act of 2006. In other words, this was the version of the Act in place in the period in which the OTP state that the alleged war crimes committed by US personnel 'primarily' took place.²⁰ This is also an important consideration for determining the scope

¹³ 18 US Code s.2441

¹⁴ Military Commissions Act of 2006, Public Law 109-366 (17 October 2006), s.6(b)(1)

¹⁵ *ibid* s.6(b)(2)

¹⁶ War Crimes Act of 1996, Public Law 104-192 (21 August 1996), s.2(a)

¹⁷ Foreign Operations, Export Financing and Related Programs Appropriations Act of 1998, Public Law 105-118 (26 November 1997), s.583

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ OTP Afghanistan investigation request (n 8) para 189

of potential prosecutions the ICC, as this definition of war crimes was the one that existed at the time the Office of Legal Counsel produced memos which stated, amongst other things, that:

“The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute. In addition, these acts must cause long-term mental harm.”²¹

Therefore, this would inform a decision on whether it was believed that those responsible for the creation of the policy should be held criminally liable for any offences under the Rome Statute that took place or whether individuals involved in interrogations had the mental element required for any crimes committed.²² It should be noted that there has been significant commentary concerning the OLC memos. For example, Markovic and Romm argue that the contents of the memos may give rise to responsibility for war crimes.²³ Nowak also states that the contents of the initial OLC memos were ‘legally unsound’,²⁴ and ‘clearly contradict the case law and practice of the competent international and regional human rights bodies’.²⁵ Additionally, Koh stated that ‘the Bybee Opinion is

²¹ Jay S Bybee, ‘Memorandum for Alberto R Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*’ (Office of Legal Counsel, 1 August 2002) <<https://www.justice.gov/olc/file/886061/download>> (Last accessed 15 May 2021), 13.

²² This is vital since Article 30(1) of the Rome Statute (n 1) states, ‘Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge’. Robinson argues that ‘If charges are not brought at the ICC, it will likely be based on the inability to establish the criminal intent of those U.S. officials responsible for the enhanced interrogation techniques.’: Peter Robinson, ‘ICC Afghanistan Torture Investigation Likely to Turn on Criminal Intent’ (Just Security, 15 April 2020) <<https://www.justsecurity.org/69595/icc-afghanistan-torture-investigation-likely-to-turn-on-criminal-intent/>> (Last accessed 15 May 2021)

²³ Milan Markovic, ‘Can Lawyers Be War Criminals?’ (2007) 20(2) *Georgetown Journal of Legal Ethics* 347, 361-65; Jake Romm, ‘No Home in this World: The Case against John Yoo before the International Criminal Court’ (2020) 20 *International Criminal Law Review* 862, generally.

²⁴ Manfred Nowak, ‘What Practices Constitute Torture: US and UN Standards’ (2006) 28 *Human Rights Quarterly* 809, 840

²⁵ *ibid*

perhaps the most clearly erroneous legal opinion I have ever read'.²⁶ It should be noted that not all discussion of the OLC memos has been critical. Posner and Vermeuele, for example, argued that 'the memorandum's arguments are standard lawyerly fare, routine stuff.'²⁷ Furthermore, Flores states that 'The Torture Memo properly cites an assortment of valid legal sources to support its conclusions and is replete with scholastic, critical analysis. In summary, John Yoo did not violate his ethical obligations as a lawyer in authoring the Torture Memo.'²⁸ In a more balanced argument, Ku argues that they disagreed with the contents of the memos,²⁹ 'insistence on *criminal punishment* of the Bush lawyers for their legal advice is both wrong-headed and dangerous'.³⁰ However, in what is a damning critique of the OLC's memos, the Senate Armed Services Committee stated in their report examining the Department of Defense's Detention and Interrogation Program that:

"OLC opinions distorted the meaning and intent of anti-torture laws, rationalized the abuse of detainees in U.S. custody and influenced Department of Defense determinations as to what interrogation techniques were legal for use during interrogations conducted by U.S. military personnel."³¹

Ultimately the issue of whether there have been prosecutions under any version of the War Crimes Act is a moot point because, as Corn and VanLandingham state, no prosecutions have been brought under the War Crimes Act at the federal level,³² and also raise that only two individuals have been charged with

²⁶ Harold Hongju Koh, 'A World Without Torture' (2005) 43 *Columbia Journal of Transnational Law* 641, 647

²⁷ Eric Posner and Adrian Vermeuele, 'A 'Torture' Memo And Its Tortuous Critics' (*Wall Street Journal*, 6 July 2004) <<https://www.wsj.com/articles/SB108906730725255526>> (Last accessed 15 May 2021)

²⁸ Carrie L Flores, 'Unfounded Allegations that John Yoo Violated His Ethical Obligations as a Lawyer' (2011) 25(1) *BYU Journal of Public Law* 1, 33

²⁹ Julian Ku, 'The Wrongheaded and Dangerous Campaign to Criminalize Good Faith Legal Advice' (2009) 42 *Case Western Reserve Journal of International Law* 449, 450

³⁰ *ibid* 451

³¹ United States Senate Select Committee on Armed Services, *Inquiry into the Treatment of Detainees in U.S. Custody* (Senate Printout 110-54, 20 November 2008) <<https://www.govinfo.gov/content/pkg/CPRT-110SPRT48761/pdf/CPRT-110SPRT48761.pdf>> (Last accessed 15 May 2021) xxvii

³² Geoffrey S Corn and Rachel E VanLandingham, 'Strengthening American War Crimes Accountability' (2020) 70 *American University Law Review* 309, 335

war crimes in the military context.³³ This means that any prosecutions under the War Crimes Act would have to be brought as a result of the amendments made following the enactment of the Military Commissions Act of 2006. This Act amended the section on breaches of Common Article 3 of the Geneva Conventions, and instead requires that for a war crime to take place, there has to be a 'grave breach of Common Article 3'.³⁴ The Act states that the following offences are classified as grave breaches of Common Article 3: 'Torture',³⁵ 'Cruel or Inhuman Treatment',³⁶ 'Performing Biological Experiments',³⁷ 'Murder',³⁸ 'Mutilation or Maiming',³⁹ 'Intentionally Causing Serious Bodily Injury',⁴⁰ 'Rape',⁴¹ 'Sexual Assault or Abuse',⁴² and 'Taking Hostages'.⁴³

Graham and Connolly state that the amended version of the War Crimes Act serves an essential purpose:

"The MCA's modification of the War Crimes Act added need clarity by specifying the exact portions of Common Article 3 that were enforceable under domestic criminal law. Without such clarification, any prosecution for a violation of Common Article 3 under the earlier version of the War Crimes Act would be susceptible to challenge for being unconstitutionally vague."⁴⁴

Whilst these amendments do make it possible to bring charges that on the face of it appear to match some of the offences under examination by the ICC, the list is by no means complete. Scheffer, for example, stated the following about

³³ *ibid* 339

³⁴ 18 US Code s.2441(c)(3)

³⁵ *ibid* s.2441(d)(1)(A)

³⁶ *ibid* s.2441(d)(1)(B)

³⁷ *ibid* s.2441(d)(1)(C)

³⁸ *ibid* s.2441(d)(1)(D)

³⁹ *ibid* s.2441(d)(1)(E)

⁴⁰ *ibid* s.2441(d)(1)(F)

⁴¹ *ibid* s.2441(d)(1)(G)

⁴² *ibid* s.2441(d)(1)(H)

⁴³ *ibid* s.2441(d)(1)(I)

⁴⁴ Lindsey O Graham and Paul R Connolly, 'Waterboarding: Issues and Lessons for Judge Advocates' (2013) 69 *Air Force Law Review* 65, 83

the Military Commissions Act's contribution to the law of war crimes in the United States:

“The MCA decriminalized certain war crimes set forth in Common Article 3 of the 1949 Geneva Conventions for purposes of US prosecution and thus created an impunity gap in U.S. law. Specifically, the following violations described in Common Article 3 can no longer be prosecuted in U.S. courts following the nine-year period during which they had been criminalized: “violence to life and person”, murder “of all kinds” (as opposed to the limited and defined circumstances set forth in 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.”⁴⁵

This is a potentially problematic situation, as it appears that the United States may be unable to conduct prosecutions into all the alleged offences being investigated by the OTP in a manner which reflects their status as international crimes. For example, one of the offences which the OTP has requested to investigate is outrages upon personal dignity under article 8(2)(c)(ii) of the Rome Statute.⁴⁶ Cerone and Matheson suggest that a reason behind this lack of inclusion is that the US government believed that the term ‘outrages upon personal dignity’ lacked the clarity required in order to constitute criminal conduct.⁴⁷ This was the case even though Matheson had observed that the United States Military had implemented the same wording internally and had not

⁴⁵ David Scheffer, ‘Closing the Impunity Gap in U.S. Law’ (2009) 8(1) *Northwestern Journal of International Human Rights* 30, 47

⁴⁶ OTP Afghanistan investigation request (n 8) paras 204-06; Rome Statute (n 1) Article 8(2)(c)(ii)

⁴⁷ John Cerone, ‘The Military Commissions Act of 2006: Examining the Relationship between the International Law of Armed Conflict and US Law’ (2006) 10(30) *American Society of International Law Insights* <<https://www.asil.org/insights/volume/10/issue/30/military-commissions-act-2006-examining-relationship-between>> (Last accessed 15 May 2021); Michael J Matheson, ‘The Amendment of the War Crimes Act’ (2007) 101(1) *American Journal of International Law* 48, 50

objected to the earlier versions of the War Crimes Act.⁴⁸ Additionally, Jenks highlights that there are significant differences between the offence of outrages upon personal dignity and the offence of ‘maltreatment of persons’ found within the Uniform Code of Military Justice.⁴⁹

Whilst this may be a potential issue since the OTP is investigating allegations of outrages upon personal dignity, it does not necessarily mean that the United States has not complied with the principle of complementarity if it can show that it has conducted investigations or prosecutions in relation to the other crimes under investigation. The OTP stated in their investigation request that ‘the prosecution considers that the required degree of severity, humiliation and degradation has been met, since the alleged conduct described as torture and cruel treatment would also meet the threshold for humiliating and degrading treatment.’⁵⁰ Additionally, in *Gaddafi*, the Pre-Trial Chamber stated that ‘a domestic investigation or prosecution for “ordinary crimes”, to the extent that the case covers the same conduct, shall be considered sufficient.’⁵¹

Pittman and Heaphy state that the Department of Defense would never allow the Department of Justice to assert jurisdiction over offences committed by active service personnel in order to try the offence federally.⁵² This may be the result of a culture that exists within the US military that war crimes are exclusively conducted by enemy forces. For example, the 2016 Department of Defense Law of War Manual cites the following provision from the Department of the Army Field Manual on the Law of Land Warfare published in July 1956:

⁴⁸ Matheson (n 47) 50

⁴⁹ Christopher Jenks, ‘Self-Interest or Self-Inflicted? How the United States Charges Its Service Members for Violating the Laws of War’ in Morten Bergsmo and SONG Tianying (eds), *Military Self-Interest in Accountability for Core International Crimes* (2nd edn, Torkel Opsahl Academic EPublisher 2018), 278-79. Pittman and Heaphy also raise the notion that there are differences in the elements of crimes between the murder offence, which William Calley was subject to court-martial and conviction for, and the offence of wilful killing under the Rome Statute: Thomas Wayde Pittman and Matthew Heaphy, ‘Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity before the International Criminal Court’ (2008) 21 *Leiden Journal of International Law* 165, 178-79

⁵⁰ OTP Afghanistan investigation request (n 8) para 205

⁵¹ *Gaddafi* Pre-Trial Chamber Decision (n 5) para 88

⁵² Pittman and Heaphy (n 49) 174. Pittman and Heaphy also highlight, at 174, that the War Crimes Act cannot be used as the basis for a court-martial because Article 134 of the UCMJ does not allow for court-martial jurisdiction for capital offences.

“The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code.”⁵³

This suggests that there may be a reluctance from the US military to properly acknowledge the damage that the conduct of their troops may cause. This may affect the ability of the ICC to consider that the United States has complied with the principle of complementarity since the Preamble to the Rome Statute states that international crimes, such as war crimes, are ‘the most serious crimes of concern to the international community as a whole’.⁵⁴ It therefore has to be considered whether a State prosecuting war crimes as different offences reflects the symbolic significance of these international crimes. Such a matter also merits consideration since in the Simone Gbagbo case, it was held that the prosecution of Gbagbo in the Côte d’Ivoire did not render the case at the ICC inadmissible.⁵⁵

The final factor which needs to be considered when discussing whether the United States has complied with the principle of complementarity with regards to its use, or lack thereof, of its war crimes legislation is the existence of a defence, implemented as part of the Detainee Treatment Act,⁵⁶ for United States personnel who committed offences committed during authorised detention and interrogation operations but who had operated on the basis that

⁵³ Department of Defense Office of General Counsel, *Department of Defense Law of War Manual June 2015 (Updated December 2016)* (Department of Defense 2016) <<https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>> (Last accessed 15 May 2021), 1118 at footnote 233; Department of the Army, *The Law of Land Warfare* (Field Manual 27-10, Department of the Army 1956) <https://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf> (Last accessed 15 May 2021), para 507b; Corn and VanLandingham (n 32) 339

⁵⁴ Rome Statute (n 1) Preamble

⁵⁵ *Prosecutor v Simone Gbagbo* (Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo) ICC-02/11-01/12/12-47-Red (11 December 2014), paras 47-48

⁵⁶ 42 US Code s.2000dd-1. This defence will be discussed further in Chapter Four.

such operations were legal. This defence was subsequently clarified in the Military Commissions Act 2006, to clarify that the defence applies for offences committed between 11 September 2001 and 30 December 2005,⁵⁷ and for offences that were 'grounded' within the provision on grave breaches of Common Article 3 contained within the War Crimes Act.⁵⁸ The very fact that this defence, which excludes individuals from criminal responsibility for charges brought under war crimes legislation, exists may be another sign that the United States is unwilling to prosecute crimes in a manner which reflects their significance to the international community.

2. Sexual Offences

As part of their request to open an investigation into the conduct of United States personnel committed in relation to the conflict in Afghanistan, the OTP allege that offences were committed under Article 8(2)(e)(vi) of the Rome Statute.⁵⁹ The allegations in relation to rape against the United States military are the following:

"The information available provides a reasonable basis to believe that members of the US armed forces penetrated the anal opening of at least three detainees. Each of the victims was allegedly probed anally by means of cavity searches or with an unknown object, in circumstances of sexual humiliation, including stripped naked in front of others, photographed nude, blindfolded and shackled nude, and/or while being sexually molested."⁶⁰

In relation to the alleged rape committed by the CIA, the OTP stated that 'the information available also provides a reasonable basis to believe that CIA interrogators penetrated the anal opening of at least two detainees by the

⁵⁷ Military Commissions Act of 2006 (n 14) s.8(b)(3)

⁵⁸ *ibid* s.8(b)(2)

⁵⁹ Rome Statute (n 1) Article 8(2)(e)(vi); OTP Afghanistan investigation request (n 8) paras 207-17

⁶⁰ *ibid* para 209

coercive practices known as “rectal rehydration”, “rectal feeding” or “rectal examination””.⁶¹

Furthermore, the OTP stated, ‘the information available provides a reasonable basis to believe that 12 detainees in the custody of US armed forces and 8 detainees in the custody of the CIA were subjected to abuse constituting “other forms of sexual violence” under the coercive circumstances of detention’.⁶² The OTP also argued that:

“The information available provides a reasonable basis to believe that the 20 detainees concerned were subjected to acts involving forced nudity, often in combination with other techniques, including during interrogations; photographing detainees naked; public exposure to female soldiers while detainees showered; sexual humiliation; being shown pornographic material with a picture of the detainee’s mother; physical molestation; sexual assault by a female soldier; and beatings on testicles.”⁶³

Because of the varying nature of these offences, it will be necessary to deal with the law that may potentially be applicable to the military and the CIA in turn. This will be done by examining the law as it existed in 2003, as the OTP allege that crimes committed by US personnel were committed ‘primarily in the period 2003-2004’.⁶⁴ This is with the exception sexual offences under the War Crimes Act , since as referred to earlier, these provisions apply retroactively.⁶⁵ This section will concentrate primarily on the allegations of rape, since as will be shown below, there are several potentially problematic aspects in relation to the law on rape within the United States. Additionally, the information provided for in the OTP’s initial investigation request is too limited to allow for a proper judgement to be made about what crimes may or may not have taken place and it would be unfair to speculate here.

⁶¹ *ibid* para 210

⁶² *ibid* para 213

⁶³ *ibid* para 216

⁶⁴ OTP Afghanistan investigation request (n 8) para 189

⁶⁵ Military Commissions Act of 2006 (n 14) s.6(b)(2)

a. The United States Military

In the time period of the United States' involvement in Afghanistan, there have been multiple versions of the law related to sexual offences included within the Uniform Code of Military Justice. The first of which, in effect until 2007, will be the version discussed in this section as this was the version that was applicable during the period in which the OTP believe that the majority of offences were committed.⁶⁶

i. Rape

The crime of rape is defined as, 'any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct'.⁶⁷ It is further stated that 'penetration, however slight, is sufficient'.⁶⁸ The Department of the Army's Military Judges' Handbook states that for the purposes of this definition of rape, "Sexual intercourse" is any penetration, however slight of the female sex organ by the penis. An ejaculation is not required.⁶⁹

This is potentially problematic, as in cases where the Office of the Prosecutor raise penetration as an issue, they do so in the context that US military personnel 'penetrated the anal opening of at least three detainees',⁷⁰ and that victims were 'probed anally by means of cavity searches or with an unknown object',⁷¹ rather than any of the acts involving 'penetration of the female sex organ by the penis'.⁷² This means that it seems highly unlikely that it would be

⁶⁶ *ibid* para 189

⁶⁷ 10 US Code s.920(a) (2000)

⁶⁸ *ibid* s.920(c)

⁶⁹ Department of the Army, *Military Judges' Benchbook* (Department of the Army, 29 February 2020, DA PAM 27-9)

<https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN21189_P27_9_FINAL.pdf> (Last accessed 15 May 2021) 502

⁷⁰ OTP Afghanistan investigation request (n 8) para 209

⁷¹ *ibid*

⁷² *Military Judges' Benchbook* (n 69) 479

possible to successfully prosecute the offences alleged by the OTP as rape, and that any charge would have to be based on different offences.

ii. Other Sexual Offences

As is shown in the *Criminal Law Deskbook* published by the Judge Advocate General's Legal Center and School, the only other sexual offences which existed within the military justice system at the time the majority of the offences were committed were sodomy, indecent assault, indecent exposure, and indecent acts.⁷³ This potentially poses problems because it is not clear that the other offences found within the UCMJ apply to the acts described by the OTP as forming their investigative focus. The definition of sodomy, under Article 125 of the UCMJ states that: 'Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of Sodomy. Penetration, however slight is sufficient to complete the offense.'⁷⁴

The 2002 Manual for Courts-Martial explanation of this offence states in relation to unnatural carnal copulation:

"It is unnatural carnal copulation for a person to take into that person's mouth or anus the sexual organ of another person... or to place that person's sexual organ in the mouth or anus of another person... or to have carnal copulation in any opening of the body, except the sexual parts, with another person."⁷⁵

⁷³ Judge Advocate General's Legal Center and School, *Criminal Law Deskbook: Practicing Military Justice* (Judge Advocate General's Legal Center and School, July 2018) <https://www.loc.gov/rr/frd/Military_Law/pdf/Crim-Law-Deskbook_July-2018.pdf> (Last accessed 15 May 2021), 21-16. As stated in the foreword this document is produced 'as a resource for Judge Advocates and paralegals, for both training and actual practice in UCMJ proceedings'

⁷⁴ 10 US Code s.925(a) (2000)

⁷⁵ Joint Service Committee on Military Justice, *Manual for Courts-Martial United States (2002 Edition)* (Joint Service Committee on Military Justice, 2002) <https://www.loc.gov/rr/frd/Military_Law/pdf/manual-2002.pdf> (Last accessed 15 May 2021) Part IV, page 79

Based on the information provided in the OTP's request to open an investigation into the conduct of United States personnel, it is unlikely that the offence of sodomy could have been committed.

This also appears to be the case in relation to the offence of indecent assault, which would have to be prosecuted under Article 134 of the UCMJ.⁷⁶ As stated in the 2002 Manual for Courts-Martial, this offence requires that 'the acts were done with the intent to gratify the lust or sexual desires of the accused'.⁷⁷ It is unclear that this was the case since the OTP states that the acts of rape committed were done 'in circumstances of sexual humiliation'.⁷⁸ This means that it would be unlikely that any offence would be committed for the purposes of sexual gratification, though a definitive determination would have to be made on a case-by-case basis.

It is also unlikely that a conviction for indecent exposure would be possible since the Manual for Courts-Martial states that this requires 'That the accused exposed a certain part of the accused's body to public view in an indecent manner',⁷⁹ and there is nothing to suggest that this was the case from the information provided in the OTP's request to open an investigation. Finally, it is also unlikely that the information provided by the ICC would suggest that it is likely that a conviction for indecent acts would be possible since the Manual for Courts-Martial states, "Indecent" signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.⁸⁰ Under the circumstances in which these acts were committed, referred to earlier, it seems questionable whether they could ever excite lust when it appears that the intent behind the acts was to cause embarrassment. This is especially the case when the OTP state that acts were

⁷⁶ 10 US Code s.934 (2000)

⁷⁷ 2002 Manual for Courts-Martial (n 75) Part IV, page 98

⁷⁸ OTP Afghanistan investigation request (n 8) para 209

⁷⁹ 2002 Manual for Courts-Martial (n 75) Part IV, page 112

⁸⁰ *ibid* Part IV, page 113

committed 'with the specific intention to sexually humiliate the detainees concerned'.⁸¹

This means that it may not be possible for the United States to be able to prosecute alleged sexual offences in a manner which reflects the sexual nature of the crime. It is, however, possible for US authorities to conduct investigations or prosecutions for alternative offences. For example, one of the 'lesser included offences' for rape referred to in the 2002 Manual for Courts-Martial is assault under Article 128 of the Uniform Code of Military Justice.⁸² It would be for the OTP and ICC to determine whether prosecutions for such an offence would satisfy the principle of complementarity.

b. Federal law

Under Federal law, there are two frameworks for sexual crimes that could apply. This includes a version of the offences of rape and sexual assault included within the War Crimes Act,⁸³ and a version under Chapter 109A of Title 18 of the United States Code.⁸⁴

i. Chapter 109A – Aggravated Sexual Abuse

Section 2241(a) of Title 18 of the United States Code provides the following definition for the crime of aggravated sexual abuse:

“Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act –

(1) By using force against that other person; or

⁸¹ OTP Afghanistan investigation request (n 8) para 214

⁸² 2002 Manual for Courts-Martial (n 75) Part IV, page 67

⁸³ 18 US Code s.2441(d)(1)(G)-(H)

⁸⁴ 18 US Code Chapter 109A (2000)

(2) By threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.”⁸⁵

In the context of this definition of aggravated sexual abuse, s.2246(2) of Chapter 109A of Title 18 of the US Code states that:

“the term “sexual act means –

- (A) contact between the penis and the vulva or the penis and the anus, and for the purposes of this paragraph contact involving the penis occurs upon penetration, however slight;
- (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
- (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
- (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person”⁸⁶

This means that, depending on the available evidence, it may be possible to prosecute individuals for rape providing that evidence existed to prove that the rectal hydration, feeding and examinations involved the use of force, and that the prerequisite intent existed. From the evidence provided in the OTP’s request to open an investigation, it appears that this will be the case - they state that one detainee was diagnosed with multiple medical issues as a result of their alleged mistreatment,⁸⁷ and that such techniques were used in circumstances

⁸⁵ 18 US Code s.2241 (2000)

⁸⁶ 18 US Code s.2246(2)(C) (2000)

⁸⁷ OTP Afghanistan investigation request (n 8) para 210

that were not medically justifiable.⁸⁸ Human Rights Watch additionally state that ‘At least three types of sexual abuse charges may apply to CIA actions under federal law. This includes sexual abuse, aggravated sexual abuse, and abusive sexual contact.’⁸⁹

ii. War Crimes Act

Under the War Crimes Act, the crime of rape is defined as the following:

“The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object.”⁹⁰

As with the previous section on rape under Chapter 109A, it appears that the allegations made by the OTP in their request to open an investigation would constitute rape under the provisions of the War Crimes Act, as the available evidence suggests that force was used in order to penetrate the alleged victims’ anus.

3. Torture and Cruel Treatment

The Office of the Prosecutor allege that United States personnel are responsible for acts of torture and other cruel treatment under Article 8(2)(c)(i) of the Rome Statute,⁹¹ using 13 different methods including waterboarding, the exploitation of sexual taboos, sensory deprivation and incommunicado detention.⁹² As stated in the ICC’s Elements of Crimes, the crime of torture under Article 8(2)(c)(i) has the following elements:

⁸⁸ *ibid* para 212

⁸⁹ Human Rights Watch (n 11) 85. Human Rights Watch further explain their reasoning for this at 85-87.

⁹⁰ 18 US Code s.2441(d)(1)(G)

⁹¹ Rome Statute (n 1) Article 8(2)(c)(i); OTP Afghanistan investigation request (n 8) 90-100

⁹² OTP Afghanistan investigation request (n 8) para 193

- “1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.”⁹³

The first relevant offence under US law of relevance to this discussion is the offence of torture found within Chapter 113C of Title 18 of the United States Code,⁹⁴ which states:

““torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;”⁹⁵

Following this implementation of this provision prohibiting torture, the United States stated in their first periodic report to the United Nations Torture Committee that all acts of torture were illegal under United States law:

⁹³ International Criminal Court, *Elements of Crimes* (International Criminal Court 2013) <<https://www.icc-cpi.int/Publications/Elements-of-Crimes.pdf>> (Last accessed 15 May 2021) 22

⁹⁴ 18 US Code ss.2340-2340B

⁹⁵ 18 US Code s.2340(1)

“Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the Convention constitutes a criminal offence under the law of the United States”.⁹⁶

The second relevant offence is the war crime of torture which is found in s.2441(d)(1)(A) of the United States Code, which states that torture is:

“The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.”⁹⁷

The final relevant offence is the war crime of cruel or inhuman treatment found within s. 2241(d)(1)(B) of the United States Code which is defined as:

“The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another person within his custody or control.”⁹⁸

This section will address the requirements of mental and physical pain required for these offences, as well as the requirement of specific intent for the two different torture offences.

⁹⁶ United Nations Committee Against Torture, ‘Consideration of Reports submitted by States Parties under Article 19 of the Convention: Initial reports of States parties due in 1995 Addendum, United States of America’ (9 February 2000) UN Doc CAT/C/28/Add.5, para 6

⁹⁷ 18 US Code s.2441(d)(1)(A)

⁹⁸ 18 US Code s.2441(d)(1)(B)

a. Physical Pain or Suffering

When addressing the level of pain or suffering required for the crimes of torture or cruel treatment to have taken place, international criminal tribunals have been clear that this level depends on the circumstances of the case in question. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), in *Brđanin* for example stated:

“Acts inflicting physical pain may amount to torture even when they do not cause pain of the type accompanying serious injury. An act may give rise to a conviction for torture when it inflicts severe pain or suffering. Whether it does so is a fact-specific inquiry.”⁹⁹

The ICTY provided guidance on factors that to be considered when determining whether torture took place in the case of *Krnjelac*, stating:

“When assessing the seriousness of the acts charged as torture, the Trial Chamber must take into account all the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim. In particular, to the extent that an individual has been mistreated over a prolonged period of time, or that he or she has been subjected to repeated or various forms of mistreatment, the severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are inter-related, follow a pattern or are directed towards the same prohibited goal.”¹⁰⁰

Since the jurisprudence of international criminal tribunals has shown that the crime of torture is reliant on the facts of any given case, this section will discuss

⁹⁹ *Prosecutor v Brđanin* (Judgement) IT-99-36-A (3 April 2007), para 251

¹⁰⁰ *Prosecutor v Krnjelac* (Judgement) IT-97-25-T (15 March 2002), para 182. See also, OTP Afghanistan investigation request (n 8) para 195

whether the law on torture as found within the United States in relation to the harm required meets the standards of international law.

In relation to the level of physical harm required to constitute torture or cruel or inhuman treatment, the only provision which specifically states what level of physical harm is required to commit an offence is for the crime of cruel or inhuman treatment, in which it is stated that:

“The term “serious physical pain or suffering” shall be applied for the purposes of paragraph 1(B) as meaning bodily injury that involves –

- (i) A substantial risk of death;
- (ii) Extreme physical pain;
- (iii) A burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or
- (iv) Significant loss or impairment of the function of a bodily member, organ or mental faculty.”¹⁰¹

It is however clear that the United States has interpreted the level of physical pain required to commit the crime of cruel or inhuman treatment is lower than the level required for torture. For example, the 1 August 2002 Bybee Memo discussing the application of torture state that, ‘Because the acts inflicting torture are extreme, there is significant range of acts that though they might constitute cruel, inhuman or degrading treatment or punishment fail to rise to the level of torture.’¹⁰² Additionally, in a memo dated 20 July 2007 by Principal Deputy Assistant Attorney General Steven Bradbury, it is stated that:

“The context of the CIT offense in the War Crimes Act indicates that the term “serious” in the statute is generally directed at a less grave category of conditions than falls within the scope of the torture offense... as a general matter, a condition would not constitute “severe physical pain or

¹⁰¹ 18 US Code s.2441(d)(2)(D)

¹⁰² Bybee memo (n 21) 46.

suffering” if it were not also to constitute “serious physical or mental pain or suffering.”¹⁰³

In this situation, it appears that even if the standards of physical harm required for the crimes of torture and cruel or inhuman treatment were the same, then very few acts would qualify as fulfilling the requirements of severe or serious harm. The Bybee Memo stated that: ‘Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure.’¹⁰⁴

However, in a December 2004 Memo, which replaced the 1 August 2002 Bybee Memo,¹⁰⁵ Acting Assistant Attorney General Daniel Levin stated that:

“We disagree with statements in the August 2002 Memorandum limiting “severe” pain under the statute to “excruciating and agonizing” pain... or to pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”¹⁰⁶

Deputy Assistant Attorney General Bradbury, in a May 2005 memo, stated that ‘the meaning of “severe physical pain” is relatively straightforward; it denotes physical pain that is extreme in intensity and difficult to endure’,¹⁰⁷ and:

¹⁰³ Steven G Bradbury, ‘Memorandum for John A Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees*’ (Office of Legal Counsel, 20 July 2007) <<https://www.justice.gov/olc/file/886296/download>> (Last accessed 15 May 2021), 15

¹⁰⁴ Bybee Memo (n 21) 46

¹⁰⁵ Daniel L Levin, ‘Memorandum Opinion for James B. Comey, Deputy Attorney General, *Re: Legal Standards Applicable under 18 U.S.C. 2340-2340A*’ (Office of Legal Counsel, 30 December 2004) <https://www.globalsecurity.org/security/library/policy/national/doj-dag_torture-memo_30dec2004.pdf> (Last accessed 15 May 2021), 2

¹⁰⁶ *ibid*

¹⁰⁷ Steven G Bradbury, ‘Memorandum for John A. Rizzo Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May be Used in the Interrogation of a High Value al Qaeda Detainee*’ (Office of Legal Counsel, 10 May 2005) <<https://www.justice.gov/olc/file/886271/download>> (Last accessed 15 May 2021), 22

““severe physical suffering” under the statute means a state or condition of physical distress, misery, affliction, or torment, usually involving physical pain, that is both extreme in its intensity and significantly protracted in duration or persistence over time.”¹⁰⁸

In relation to the use of the United States’ torture provisions, the prosecution of Chuckie Taylor is the only case which has resulted in a conviction for torture,¹⁰⁹ and in that case, the 11th Circuit Court of Appeals noted that the conduct for which Taylor had been convicted was different from the type of conduct which was discussed in the Torture Memos.¹¹⁰ Carter stated that ‘it would be fair to say that criminal prosecutions for torture, rather than the underlying acts, are close to nonexistent.’¹¹¹ It should, however, be noted that a Grand Jury indicted Sulejman Mujagic for torture prior to him being extradited to Bosnia and Herzegovina to stand trial,¹¹² and Michael Sang Correa has been indicted for alleged torture committed in The Gambia.¹¹³

It is clear that the interpretation of torture presented in the Bybee Memo is not considered acceptable at the international level, as this section of the memo was cited by the defence in the ICTY case of *Brđanin*, and subsequently rejected by the Appeals Chamber on the basis that it in no way reflected the definition of torture as set out in either the Torture Convention or in customary international law.¹¹⁴ The court went so far as to specifically state, ‘No matter

¹⁰⁸ Ibid 23

¹⁰⁹ William J Aceves, ‘United States v George Tenet: A Federal Indictment for Torture’ (2015) 48(1) New York University Journal of International Law and Politics 1, 47; Linda Carter, ‘Torture and the War on Terror: The Need for Consistent Definitions and Legal Remedies’ (2012) 6 Journal of National Security Law and Policy 291, 310

¹¹⁰ *United States v Belfast* 611 F.3d 783 (11th Circuit 2010), 823

¹¹¹ Carter (n 109) 310

¹¹² United Nations Committee against Torture, ‘Information received from the United States of America on follow-up to the concluding observations’ (14 January 2016) UN Doc CAT/C/USA/CO/3-5/Add.1, para 13

¹¹³ United States Department of Justice Office of Public Affairs, ‘Gambian Man Indicted on Torture Charges’ (United States Department of Justice, 11 June 2020) <<https://www.justice.gov/opa/pr/gambian-man-indicted-torture-charges>> (Last accessed 15 May 2021)

¹¹⁴ *Brđanin* (n 99), paras 244-49

how powerful or influential a country is, its practice does not automatically become customary international law.¹¹⁵

Carter argues that, following the issuing of a memo in 2004 that withdrew the 2002 memo's requirements for the level of physical harm required for torture to have taken place, the understanding of the level of physical harm required under United States law moved closer to the requirements of the Torture Convention and that by the time of the Obama Administration, the US interpretation was in line with these requirements.¹¹⁶ However, it is debateable that the Bush Administration did move closer to the requirements of the Torture Convention. Alvarez, and Sandholtz, for example, argue that withdrawal of the Bybee Memo's position on torture did not necessarily represent a change in the Bush Administration's policy on Torture, as replacement memos did not reject the arguments made by the Bybee Memo in relation to physical harm, they simply state that such arguments weren't required.¹¹⁷

Additionally, Ross argues that the comments of President Bush on the extent of executive power when signing the Detainee Treatment Act meant that the executive branch of the United States government was still of the belief that it could authorise conduct which may be classified as either torture or cruel or inhuman treatment.¹¹⁸ Furthermore, even after the signing of the Act, Steven Bradbury, the United States Principal Deputy Assistant Attorney General, issued a memo to the General Counsel for the CIA, stating that the use of six corrective and conditioning techniques did not meet the requirements for either physical or mental pain for the crimes of torture or cruel or inhuman treatment.¹¹⁹ These techniques are all included within the list of techniques

¹¹⁵ *ibid* para 247

¹¹⁶ Carter (n 109) 296-98

¹¹⁷ Jose A Alvarez, 'Torturing the Law' (2006) 37(2) *Case Western Reserve Journal of International Law* 175, 196-98; Wayne Sandholtz, 'Closing off the Torture Option', (2009) 18 *Southern California Interdisciplinary Law Journal* 589, 595-96

¹¹⁸ James Ross, 'Black letter abuse: the US legal response to torture since 9/11' (2007) 89(867) *International Review of the Red Cross* 561, 578-79

¹¹⁹ The six techniques requested are listed at Bradbury (n 103) 8-10. It is stated at 26 that 'the six techniques proposed for use by the CIA, when used in accordance with their accompanying limitations and safeguards, do not violate the specific offences established by the War Crimes Act.'

alleged by the OTP to have constituted torture or cruel treatment against those in the custody of the United States.¹²⁰

Ultimately, the interpretation of severe physical pain and suffering presented in the Torture Memos may not be relevant in deciding whether the crime of torture did take place. This is because the United States 11th Circuit of Appeals stated in *Belfast*:

“the Torture Act contains a specific and unambiguous definition of torture that is derived from the definition provided in the CAT. The language of that statute – not an executive branch memorandum – is what controls the definition of the crime.”¹²¹

However, the Court also stated that the memos were irrelevant in that case.¹²² Therefore, if a case was brought in relation to a case involving alleged torture that took place when the memos were in force, that court may have a different opinion.

b. Mental Pain or Suffering

The Torture Act states that in relation to mental pain or suffering,¹²³ it must have been the result of one of four types of action, as defined in 18 US Code s. 2340(2):

““severe mental pain or suffering” means the prolonged mental harm caused by or resulting from –
(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

¹²⁰ OTP Afghanistan investigation request (n 8) para 193

¹²¹ *Belfast* (n 110) 823

¹²² *ibid*

¹²³ 18 US Code s.2340

- (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (C) the threat of imminent death; or
- (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality”¹²⁴

‘Severe mental pain or suffering’ carries the same definition for torture as a war crime under 18 US Code s. 2441.¹²⁵ Additionally, the crime of cruel or inhuman treatment requires that ‘serious mental pain or suffering’ is caused by one of the four acts listed above.¹²⁶ The United States government in their initial report to the Torture Committee explained why the Torture Act requires one of the four acts listed in 18 US Code s.2340(2) in order for torture to take place, stating:

“As all legal systems recognize... assessment of mental pain and suffering can be a very subjective undertaking. There was some concern within the United States criminal justice community that in this respect the Convention’s definition regrettably fell short of the constitutionally required precision for defining criminal offences.”¹²⁷

However, rather than providing clarity in relation to the definition of mental pain and suffering, the United States definition of mental torture has proven to be problematic. Luban and Shue, for example state, ‘it includes a cramped, convoluted, and arbitrary definition of mental pain or suffering, so narrow that few techniques of mental torment qualify as torture under the law’.¹²⁸ They

¹²⁴ 18 US Code s.2340(2)

¹²⁵ 18 US Code s.2441(d)(2)(A)

¹²⁶ 18 US Code s.2441(d)(2)(E). The distinction in this case is that under s.2441(d)(2)(E)(i), ‘the term “serious” shall replace the term “severe” where it appears’; and under s.2441(d)(2)(E)(ii), for harm taking place ‘after the date of the enactment of the Military Commissions Act of 2006, the term “serious and non-transitory mental harm (which need not be prolonged)” shall replace the term “prolonged mental harm” where it appears.

¹²⁷ Initial Report of the USA to Torture Committee (n 96) para 95

¹²⁸ David Luban and Henry Shue, ‘Mental Torture: A Critique of Erasures in US Law’ (2012) 100 *Georgetown Law Journal* 823, 825

further argue that these requirements 'have nothing to do with the basic definition of torture as severe pain or suffering'.¹²⁹ Additionally, Carter argues that the definition of mental pain as adopted in the United States may not meet with international standards in relation to torture, arguing that rape may not give rise to the required type of mental pain for torture under US law despite the ICTY holding in *Kunarac* that rape can result in the level of mental harm required for torture under international law.¹³⁰

Furthermore, it is difficult to see how a number of the offences under investigation by the OTP could ever qualify as torture for the purposes of United States law, despite being classified as either torture or cruel or inhuman treatment by the OTP. The OTP, for example states:

“A number of these interrogation techniques *per se* meet the threshold of severity and thus amount to torture or cruel treatment, as they necessarily cause severe pain or suffering. These include the use of sexual violence, severe isolation, suffocation by water or waterboarding, hooding under special conditions, threats of torture and the use of dogs to induce fear.”¹³¹

It is difficult to see how an offence such as waterboarding involves the four factors required in order for mental harm to constitute torture under the Torture Act. Reyes, for example, states that typically the effects of waterboarding last for a relatively short period but the aspect that results in it becoming torture is a fear of recurrence.¹³² Additionally, a report jointly published by Physicians for Human Rights and Human Rights First states that ‘The experience of near-suffocation is also associated with the development of predominantly respiratory panic attacks, high levels of depressive symptoms, and prolonged posttraumatic

¹²⁹ *ibid*

¹³⁰ Carter (n 109) 299; *Prosecutor v Kunarac* (Judgement) IT-96-23-1-A (12 June 2002), para 150

¹³¹ OTP Afghanistan investigation request (n 8) para 194

¹³² Hernan Reyes, ‘The worst scars are in the mind: psychological torture’ (2007) 89(867) *International Review of the Red Cross* 591, 603-04

stress disorder'.¹³³ Furthermore, Ross argues that changes made to the threshold of mental harm required for the crime of cruel or inhuman treatment in the amended War Crimes Act for acts committed following the Act's amendment (which will be discussed below) are an indication that the use of waterboarding and other similar actions had not constituted a violation of United States law.¹³⁴

It may therefore be difficult for the United States to be able to satisfy the principle of complementarity in relation to the allegations of torture by prosecuting such offences under the Torture Act since it appears that the alleged offences were not the result of any of the four forms of conduct required by the Torture Act. This is a matter of significance since the Torture Committee in their General Comment Number Two state that:

“By defining the offence of torture as distinct from common assault or other crimes, the Committee considers that States Parties will directly advance the Convention’s overarching aim of preventing torture and ill-treatment. Naming and defining this crime will promote the Convention’s aim, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture.”¹³⁵

This leaves the question of whether it would be possible to prosecute allegations of torture as such under the amended War Crimes Act since this also contains a provision on torture.¹³⁶ However, reliance on this approach will not necessarily lead to different consequences since the Act states, ‘the term “severe mental pain or suffering” shall be applied for the purposes of paragraphs 1(A) and 1(B) in accordance with the meaning given that term in section 2340(2) of this title’.¹³⁷ Therefore, the problems inherent within the Torture Act are inherent within the torture offence under the War Crimes Act.

¹³³ Physicians for Human Rights and Human Rights First, ‘Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality’ (Physicians for Human Rights, August 2007) <<https://phr.org/wp-content/uploads/2007/08/leave-no-marks-1.pdf>> (Last accessed 15 May 2021), 18

¹³⁴ Ross (n 118) 586-87

¹³⁵ United Nations Committee against Torture, ‘General Comment No.2: Implementation of Article 2 by States Parties’ (24 January 2008) UN Doc CAT/C/GC/2, para 11.

¹³⁶ 18 US Code s.2441(d)(1)(A)

¹³⁷ 18 US Code s.2441(d)(2)(A)

This led Luban and Shue to state, 'once again, the mental pain or suffering has completely disappeared, having been redefined as the harm that sometimes results from mental pain or suffering.'¹³⁸ It may be the case that the United States is unable to prosecute in cases where the alleged harm is mental rather than physical, and therefore may not be able to satisfy the principle of complementarity unless prosecutions for other offences were deemed to comply with the same person or conduct test.

c. Specific Intent

The final issue to be discussed in this section is the matter of specific intent, which is required under the torture provisions contained within the Torture Act and the War Crimes Act. The Torture Act states:

““torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control” .¹³⁹

The War Crimes Act torture provision states, that torture is the result of:

“an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any other reason based on discrimination of any kind.”¹⁴⁰

This inclusion of specific intent is reflective of an understanding issued by the United States at the time they ratified the Torture Convention, in which they stated that specific intent is required in order for an act of torture to have taken

¹³⁸ Luban and Shue (n 128) 848

¹³⁹ 18 US Code s.2340(1)

¹⁴⁰ 18 US Code s.2441(d)(1)(A)

place.¹⁴¹ Hathaway, Nowlan and Spiegel argue that other State parties to the Torture Convention must have accepted the US's belief that specific intent was a requirement for torture since they did not raise any objections to the US Understanding to the Torture Convention.¹⁴² If this is the case, it may be the case that United States law in relation to intent meets the standards of international law. As such, if a prosecution was to be carried out for torture, it would be difficult to argue that the intent requirements of the torture offence mean that a prosecution does not address the same conduct as any proposed prosecution at the ICC.

However, it is not at all clear whether a simple conclusion could ever be reached in this situation, as Parry for example stated in relation to the United States Understanding to the Torture Convention, 'These changes arguably reduce ambiguity, but even more so they create additional space for coercive practices by limiting the applicability of international law.'¹⁴³ Additionally, King argues that the specific intent standard required by the United States is a higher standard than is the case in other States.¹⁴⁴ This is also the case despite the fact that Carter points out that in the context of immigration law, the United States has implemented a standard in relation to their obligations under the Torture Convention that is contrary to the standards required by the ICTY as 'The courts interpret "specific intent" to mean an intent to achieve the result – in this case, the severe pain and suffering'.¹⁴⁵

Hathaway, Nowlan and Spiegel argue that the legislative history of the Torture Act in Congress suggests that 'specific intent was properly understood to mean

¹⁴¹ The text of the Understanding to the Torture Convention by the United States can be found at: United Nations Treaty Collection, 'Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment' (United Nations Treaty Collection) <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf>> (Last accessed 15 May 2021), 7

¹⁴² Oona Hathaway, Aileen Nowlan and Julia Spiegel, 'Tortured Reasoning: The Intent to Torture Under International and Domestic Law' (2012) 52 *Virginia Journal of International Law* 791, 806-07

¹⁴³ John T Parry, 'The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees' (2005) 6(2) *Melbourne Journal of International Law* 516, 526-27

¹⁴⁴ Charity King, 'The Future of Torture in the United States: The Army Field Manual on Interrogation's Compliance with the Convention against Torture' (2016) 51 *Texas Journal of International Law* 143, 150

¹⁴⁵ Carter (n 109) 301-02

that severe pain and suffering must be knowingly (not unintentionally) inflicted for a prohibited purpose.¹⁴⁶ The August 2002 Bybee memo stated that even though juries would be able to infer specific intent from knowledge on the part of a defendant that their actions will result from their actions,¹⁴⁷ 'because Section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective'.¹⁴⁸ The 2002 Bybee memo stated that in cases where an individual acts on a good faith belief that their actions do not break the law, there can be no specific intent.¹⁴⁹

In their report on the memoranda produced by the Office of Legal Counsel, the Office of Professional Responsibility (OPR) stated that 'we concluded that the memorandum erroneously suggested that an interrogator who inflicted severe physical or mental pain or suffering on an individual would not violate the torture statute if he acted with the goal or purpose of obtaining information',¹⁵⁰ and stated that 'The availability of good faith as a defence to torture is not a foregone conclusion'.¹⁵¹ The OPR also noted that the author of the memo, John Yoo,¹⁵² did not fully understand the law in relation to specific intent.¹⁵³

The Bybee Memo also stated that the defences of necessity and self-defence may be raised by a defendant who is accused of torture.¹⁵⁴ Clark questions the invocation of these defences on the basis that a detainee in custody would not be in a position to harm their interrogator.¹⁵⁵ Additionally, Alvarez questions how necessity can be raised as a defence on the basis that no such defence is available for torture under international law and that even if such a defence did

¹⁴⁶ Hathaway, Nowlan and Spiegel (n 142) 808

¹⁴⁷ Bybee Memo (n 21) 5

¹⁴⁸ *ibid* 3

¹⁴⁹ *ibid* 4

¹⁵⁰ Office of Professional Responsibility, 'Report: 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' (Office of Professional Responsibility, 29 July 2009) <<https://fas.org/irp/agency/doj/opr-final.pdf>> (Last accessed 15 May 2021), 169

¹⁵¹ *ibid* 174

¹⁵² *ibid* 251

¹⁵³ *ibid* 166-67

¹⁵⁴ Bybee Memo (n 21) 39-46

¹⁵⁵ Kathleen Clark, 'Ethical Issues Raised by the OLC Torture Memorandum' (2005) 1 *Journal of National Security Law and Policy* 455, 460

exist, it would be almost impossible to prove that torture was the only course of action available to an interrogator.¹⁵⁶

As a matter of United States policy, good faith reliance on legal advice does appear to act as a barrier to prosecutions, as President Obama said in 2009 that CIA members relying on legal advice in relation to authorized operations would not be prosecuted,¹⁵⁷ stating ‘nothing will be gained by spending our time and energy laying blame for the past’.¹⁵⁸ Additionally, as part of the Detainee Treatment Act, it is stated that in the context of detention and interrogation programmes involving foreign nationals, a defence exists to persons who did not know that the practices that they were involved in were unlawful.

Additionally, good faith reliance on legal advice is a factor to be taken into account when determining whether this knowledge existed or not.¹⁵⁹ This defence applies to acts that took place between 11 September 2001 and 30 December 2005.¹⁶⁰ The policies of the United States in relation to criminal investigations and prosecutions will be discussed further in Chapter Four.

Even though Luban and Shue state that the existence of this defence was part of an effort to ensure that US personnel would not be held accountable for their actions,¹⁶¹ the existence of the defence and the Obama Administration’s position that prosecutions would not be carried out in relation to authorised investigations may be a recognition of the belief that torture became a tolerated aspect of the war on terror. A 2004 report from the American Bar Association, for example, states, ‘what does seem clear is that the memoranda and the decisions of high U.S. officials at the very least contributed to a culture in which prisoner abuse became widespread’.¹⁶² Additionally, a 2007 survey found that

¹⁵⁶ Alvarez (n 117) 191-93

¹⁵⁷ Mark Mazzetti and Scott Shane, ‘Interrogation Memos Detail Harsh Tactics by the C.I.A.’ (*New York Times*, 16 April 2009) <<https://www.nytimes.com/2009/04/17/us/politics/17detain.html>> (Last accessed 15 May 2021)

¹⁵⁸ *ibid*

¹⁵⁹ 42 US Code s.2000dd-1

¹⁶⁰ Military Commissions Act of 2006 (n 14) s.8(b)

¹⁶¹ Luban and Shue (n 128) 847

¹⁶² American Bar Association, ‘American Bar Association Report to the House of Delegates’ (American Bar Association, 9 August 2004) <https://www.americanbar.org/content/dam/aba/administrative/international_law/torture8_04.pdf> (Last accessed 15 May 2021), 4.

soldiers in Iraq still believed that torture was legal in some circumstances.¹⁶³ This position does not, however, explain why high ranking policy makers have not been held accountable for their actions. In the OTP's request to open an investigation into the situation in Afghanistan, it is stated that to date, no prosecutions have been brought against those that the OTP considers are most responsible for the alleged crimes under investigation.¹⁶⁴ In fact, those responsible for the creation of the OLC memos also sought to express their view that international law did not apply in the context of the US war on terror.¹⁶⁵

It is also the case, however, that the individuals involved in the creation of policies which ultimately led to the allegations under investigation by the ICC do not reflect the universal position of the entirety of the United States legal community. For example, Scharf highlights how the Legal War Council lacked the involvement of the State Department Legal Advisor, William H Taft IV, who had raised concerns about the policy course of the Bush Administration.¹⁶⁶ Additionally, Dickinson suggests that, in the context of the military, the fact that legal rules and personnel were so engrained into military culture actually helped to ensure compliance with international law.¹⁶⁷ Scharf argues that the State Department Legal Advisor and the military acting in concert may have been able to ensure that the US always acted in a manner compatible with international law.¹⁶⁸

Also, the 2002 Bybee memo was ultimately revoked by Jack Goldsmith who stated:

¹⁶³ Thomas E Ricks and Ann Scott Tyson, 'Troops at Odds with Ethics Standards' (*Washington Post*, 5 May 2007) <<http://www.washingtonpost.com/wp-dyn/content/article/2007/05/04/AR2007050402151.html>> (Last accessed 15 May 2021)

¹⁶⁴ OTP Afghanistan investigation request (n 8) paras 209 and 312

¹⁶⁵ John C Yoo, 'Letter for Alberto R. Gonzales, Counsel to the President from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel' (August 1, 2002) <<https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug1.pdf>> (Last accessed 15 May 2021)

¹⁶⁶ Michael P Scharf, 'The Torture Lawyers' (2010) 20 *Duke Journal of Comparative and International Law* 389, 392-403

¹⁶⁷ Laura A Dickinson, 'Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance' (2010) 104 *American Journal of International Law* 1, 12-14

¹⁶⁸ Scharf (n 166) 400

“on an issue that demanded the greatest of care, OLC’s analysis of the law of torture in the August 1, 2002, opinion and the March 2003 opinion was legally flawed, tendentious in substance and tone, and overbroad and thus largely unnecessary. My main concern upon reading the opinions was that someone might rely on their green light to justify interrogations much more aggressive than ones specifically approved and then maintain, not without justification, that they were acting on the basis of the OLC’s view of the law.”¹⁶⁹

This suggests that the torture policies did not come about as a result of systemic flaws, rather it was the case that a group of people attempted to justify what were previously unjustifiable individuals and it would therefore be possible to hold them to account. This will be discussed further in the next chapter on the reports of the United States Senate.

4. Conclusion

In conclusion, it appears that whilst it may be possible for the United States to be able to satisfy the principle of complementarity in relation to some alleged perpetrators of international crimes in a manner which reflects both the nature and significance of the crime, it is by no means certain that this is the case for all the alleged offences. For example, the crime of rape under the Uniform Code of Military Justice required penetration of either a genital opening or for that penetration to be done by a penis but the wrongdoing alleged by the OTP involves anal penetration, including by the use of objects. Additionally, the threshold for pain or suffering for the crimes of torture and cruel or inhuman treatment appears to be so high that it severely restricts the potential application of the offences. The most problematic aspect in relation to United States law may however be that laws exist to provide individuals with defences for crimes within the War Crimes Act, an action that may be seen by the OTP as

¹⁶⁹ Jack Goldsmith, *The Terror Presidency: Law and Judgement inside the Bush Administration* (W.W. Norton and Company 2009), 151

contributing towards a situation whereby those most responsible for international crimes cannot be held to account. To determine whether the United States has complied with the principle of complementarity, it will be necessary to examine the range of criminal investigations that have been conducted in relation to the conflict in Afghanistan, as well as other investigatory mechanisms that have been used by the United States to address allegations of wrongdoing.

Chapter Three: United States Senate Reports

This Chapter will discuss two reports published by select committees of the United States Senate in relation to allegations of detainee abuse – the Report of the Senate Armed Services Committee on the Treatment of Detainees in US Custody (Armed Services Committee Report),¹ and the Executive Summary of the Report of the Senate Intelligence Committee on the CIA’s Detention and Interrogation Program (Intelligence Committee Report).² These reports will be discussed because they have been relied upon as a source of evidence by the Office of the Prosecutor in their request to open an investigation in relation to alleged War Crimes in Afghanistan,³ and by Pre-Trial Chamber Two in their judgment on the OTP’s investigation request.⁴ Whilst these reports were cited as evidence of war crimes in the ICC context, it has to be asked whether they demonstrate that the United States is willing to conduct an investigation into alleged war crimes since under Article 17 of the Rome Statute, the ICC is only able to act where a State is unwilling or unable to investigate such offences.⁵

These factors must be considered in light of the limited impact of the reports in relation to the current practice of the United States. By the time the Armed Services Committee Report was published in November 2008, the Detainee Treatment Act of 2005 had been implemented.⁶ This Act limited the range of interrogation techniques available in the context of the Department of Defense’s

¹ United States Senate Select Committee on Armed Services, *Inquiry into the Treatment of Detainees in U.S. Custody* (Senate Printout 110-54, 20 November 2008) <<https://www.govinfo.gov/content/pkg/CPRT-110SPRT48761/pdf/CPRT-110SPRT48761.pdf>> (Last accessed 15 May 2021)

² United States Senate Select Committee on Intelligence, *Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program together with Foreword by Chairman Feinstein and Additional and Minority Views* (Senate Report 113-288, 9 December 2014) <<https://www.congress.gov/113/crpt/srpt288/CRPT-113srpt288.pdf>> (Last accessed 15 May 2021).

³ *Situation in the Islamic Republic of Afghanistan* (Public redacted version of “Request for authorisation of an investigation pursuant to Article 15”) ICC-02/17-7-Red (20 November 2017), para 36

⁴ *Situation in the Islamic Republic of Afghanistan* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17-33 (12 April 2019), paras 46-48

⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 17

⁶ Detainee Treatment Act of 2005, Public Law 109-148, Title X (30 December 2005)

(DoD) Detention and Interrogation Program, stating ‘No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Field Manual on Intelligence Interrogation.’⁷ Furthermore, by the time the Intelligence Committee Report was published in December 2014, the CIA’s Detention and Interrogation Program had already been ended as a result of a January 2009 Executive Order from the Obama Administration.⁸

The impact of these reports as a potential means of satisfying the principle of complementarity also have to be considered in light of the apparent lack of willingness on the part of the United States in pursuing criminal prosecutions for those responsible for the alleged abuses conducted as a result of authorised detention and interrogation operations. For example, in August 2009, when announcing ‘a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations’,⁹ United States Attorney General Eric Holder stated, ‘the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal advice given by the Office of Legal Counsel regarding the interrogation of detainees.’¹⁰

Additionally, President Obama made similar statements, at the release of Office of Legal Counsel memos from the Bush Administration, stated, ‘This is a time for reflection, not retribution... at a time of great challenges and disturbing disunity, nothing will be gained by spending our time and energy laying blame

⁷ *ibid* s.1002(a)

⁸ Executive Order 13491 ‘Ensuring Lawful Interrogations’ (22 January 2009)

⁹ United States Department of Justice, ‘Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees’ (United States Department of Justice, 24 August 2009) <<https://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees>> (Last accessed 15 May 2021)

¹⁰ *Ibid*. This preliminary review was ultimately closed without any prosecutions, despite two criminal investigations being launched: see United States Department of Justice, ‘Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees’ (United States Department of Justice, 30 August 2012) <<https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees>> (Last accessed 15 May 2021)

for the past.’¹¹ Furthermore, despite President Obama stating that the Intelligence Committee Report ‘reinforces my long-held view that these harsh methods were not only inconsistent with our values as a nation, they did not serve our broader counterterrorism efforts or our national security interests’,¹² the Department of Justice decided not to pursue any prosecutions.¹³

These factors necessitate the need for consideration of whether the pursuit of widespread prosecutions of those responsible for the perpetration of alleged war crimes is the only means by which the United States can satisfy the principle of complementarity, or whether the two Senate Reports may constitute an effective investigation for the purposes of Article 17 of the Rome Statute.¹⁴ This is especially the case when it is considered that the Intelligence Committee Report examined ‘more than six million pages of CIA materials, to include operational cables, intelligence reports, internal memoranda and emails, briefing materials, interview transcripts, contracts, and other records’,¹⁵ and the Armed Services Committee Report considered ‘more than 200,000 pages of classified and unclassified documents, including detention and interrogation policies, memoranda, electronic communications, training manuals, and the results of previous investigations into detainee abuse’.¹⁶

In order to consider the impact of these US Senate Reports and their potential impact in relation to the applicability of the principle of complementarity, this Chapter will examine the findings of the reports regarding the development of the DoD and CIA Detention and Interrogation policies, whether the reports highlight an effective means of ensuring accountability for alleged wrongdoing

¹¹ White House, ‘Statement of President Barack Obama on Release of OLC Memos’ (White House, 16 April 2009) <<https://obamawhitehouse.archives.gov/the-press-office/statement-president-barack-obama-release-olc-memos>> (Last accessed 15 May 2021)

¹² White House, ‘Statement by the President Report of the Senate Select Committee on Intelligence’ (White House, 9 December 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/12/09/statement-president-report-senate-select-committee-intelligence>> (Last accessed 15 May 2021)

¹³ Julian Hatter, ‘DOJ won’t reopen torture probe after CIA report’ (The Hill, 10 December 2014) <<https://thehill.com/policy/defense/226603-justice-department-wont-reopen-torture-probes>> (Last accessed 15 May 2021). The policies of the United States in relation to criminal investigations and prosecutions will be discussed further in Chapter Four.

¹⁴ Rome Statute (n 5), Article 17

¹⁵ Intelligence Committee Report (n 2) viii

¹⁶ Armed Services Committee Report (n 1) viii

(or are in of themselves), and the response to the release of these reports including whether this led to action which would prevent the recurrence of abuses.

1. The Development of the DoD and CIA Detention and Interrogation Policies

This section will discuss the development of detention and interrogation policies by the DoD and the CIA. This will be broken down into two sections, one focusing on each of the detention and interrogation policies. Whilst the OTP's Afghanistan investigation request states that the crimes alleged to have been committed in the context of the DoD detention and interrogation program have taken place since 1 May 2003,¹⁷ the section discussing the DoD detention and interrogation policy will include discussions regarding the development of policies designed for use at Guantanamo Bay prior to 2003,¹⁸ since as will be shown, this had a significant impact on the development of interrogation policy in Afghanistan. Additionally, whilst the OTP request to open an investigation in relation to Afghanistan states that alleged war crimes perpetrated by members of the CIA have occurred 'in the period since 1 July 2002',¹⁹ though predominately in 2003 and 2004,²⁰ the section discussing the CIA's detention and interrogation program will discuss events which occurred throughout the program's history. The purpose of this section is to discuss whether the two Senate Reports demonstrate that evidence exists to suggest that there is a need to hold individuals criminally liable for alleged detainee abuse.

¹⁷ OTP Afghanistan investigation request (n 3) para 187. However, as stated in para 189, the OTP believes that the majority of the alleged crimes were committed in 2003 or 2004.

¹⁸ It should, however, be noted that the OTP's investigation request states that 'the Prosecution has excluded persons who were originally detained in the context of the armed conflict in Afghanistan but subject to alleged crimes on the territory of States that are not party to the Statute, such as on the US naval base at Guantanamo Bay, Cuba.': *ibid* para 250

¹⁹ *ibid* para 187

²⁰ *ibid* para 189

a. The Development of the Department of Defense's Detention and Interrogation Policy

The Armed Services Committee Report highlights the overwhelming role played by the Joint Personnel Recovery Agency (JPRA) and Survival, Evasion, Resistance, Escape (SERE) School tactics with seven of the report's nineteen conclusions focusing on the role played by JPRA and SERE tactics.²¹ In relation to SERE tactics, the Report states that 'The use of techniques in interrogations derived from SERE resistance training created a serious risk of physical and psychological harm to detainees',²² and that the controls that are in place to prevent harm to SERE students do not exist in live interrogations.²³ This section will discuss the development of policy before discussing how the policy manifested itself in Afghanistan.

i. The Role of Survival, Evasion, Resistance and Escape Techniques and the Joint Personnel Recovery Agency in the Development of Interrogation Policy

As a preliminary matter, it is necessary to explain the purpose of JPRA and SERE training. As the Armed Services Committee Report states, JPRA is a DoD agency under the United States Joint Force Command,²⁴ and is 'responsible for coordinating joint personnel recovery capabilities. Personnel recovery is the term used to describe efforts to obtain the release or recovery of captured, missing, or isolated personnel from uncertain or hostile environments and denied areas',²⁵ which includes oversight of SERE training.²⁶ In relation to the resistance phase of SERE training, the Armed Services Committee Report states that:

²¹ Armed Services Committee Report (n 1) xxvi-xxix – Conclusions 3-9

²² *ibid* xxvi – Conclusion 4

²³ *ibid*

²⁴ *ibid* 4

²⁵ *ibid*

²⁶ *ibid*

“The techniques used in SERE school, based in part, on Chinese Communist techniques used during the Korean War to elicit false confessions, include stripping students of their clothing, placing them in stress positions, putting hoods over their heads, disrupting their sleep, treating them like animals, subjecting them to loud music and flashing lights, and exposing them to extreme temperatures.”²⁷

Furthermore, the Report cites a memo by Joseph Witsch, a JPRA instructor who provided training on SERE techniques to Guantanamo Bay personnel, which states the following:

“We base our role-play laboratories on what we know our former enemies have done to our personnel in captivity. It is based on illegal exploitation (under the rules listed in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War) of prisoners over the last 50 years.”²⁸

These points regarding the use of unorthodox techniques are highlighted in Army Regulation 350-30, the army regulation governing SERE training between 1985 and 2010, which states that SERE training includes ‘Communist prisoner of war management techniques to include – (1) Interrogation and indoctrination methods, techniques, and goals. (2) Physical and psychological stresses. (3) Pavlovian and respondent conditioning.’²⁹

The report also shows that those who act as interrogators at SERE Schools are not qualified interrogators,³⁰ and in some cases provide training in techniques

²⁷ *ibid* xiii

²⁸ *ibid* 48 citing Joseph Witsch, ‘Memorandum: U.S. Army Special Operations Command (USASOC), Requirement to Provide Exploitation Instruction’ (24 September 2002); Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950)

²⁹ United States Army, *Code of Conduct, Survival, Evasion, Resistance, and Escape (SERE) Training* (Army Regulation 350-30, 10 December 1985) <<https://fas.org/irp/doddir/army/ar350-30.pdf>> (Last accessed 15 May 2021), Chapter 2-10. Army Regulation 350-30 was replaced on 5 March 2010 by United States Army, *Personnel Recovery* (Army Regulation 525-28, 5 March 2010) <https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r525_28.pdf> (Last accessed 15 May 2021)

³⁰ Senate Armed Services Committee Report (n 1) xiii

for which they do not know the full procedure. For example, the Report highlights that Joseph Witsch had told Committee Staff that ‘he was not aware that students at the U.S. Navy’s SERE school could not be subjected to waterboarding for more than 20 seconds, if a cloth is placed over the students face’,³¹ despite this point being emphasised in the Navy SERE school’s manual.³² This may help to demonstrate why the following statement from Lieutenant Colonel Banks is the case: ‘Because of the danger involved, very few SERE instructors are allowed to actually use physical pressures. It is extremely easy for U.S. Army instructors, training U.S. Army soldiers, to get out of hand, and to injure students.’³³

The Armed Services Committee Report shows that in December 2001, the DoD General Counsel’s Office contacted the JPRA to find out information regarding techniques that could be used to exploit detainees,³⁴ something which the Armed Services Committee state they were unaware of happening before.³⁵ The report goes on to highlight a further request in July 2002 with the Deputy General Counsel for Intelligence Richard Shiffrin requesting information from JPRA Chief of Staff Lieutenant Colonel Daniel Baumgartner about ‘techniques that had been effective against Americans’,³⁶ which itself was followed up by a request for further information.³⁷ Shiffrin testified to the Armed Services Committee that one of the purposes of these requests for information was to ‘reverse-engineer’ the techniques used in SERE School to teach students how to resist interrogations.³⁸ However, when asked why JPRA was contacted, Shiffrin stated that the General Counsel’s Office was trying to find out about how to conduct interrogations for purposes other than law enforcement,³⁹ as the DoD had not been involved in interrogations for this purpose since the Vietnam

³¹ *ibid* 93

³² *ibid* 93-94

³³ *ibid* 5

³⁴ *ibid* 3-4

³⁵ *ibid* xiii

³⁶ *ibid* 24

³⁷ *ibid* 26

³⁸ *ibid* 26; United States Senate Committee on Armed Services, ‘The Treatment of Detainees in U.S. Custody – Hearings before the Committee on Armed Services of the United States Senate’ (Senate Hearing 110-720, 17 June and 25 September 2008)

<https://fas.org/irp/congress/2008_hr/treatment.pdf> (Last accessed 15 May 2021), 61-62

³⁹ United States Senate Armed Services Committee Hearing (n 38) 24

War.⁴⁰ In response to the follow-up request for information, Lieutenant Colonel Baumgartner sent three memos to the DoD's General Counsel's Office. These included a list of tactics used to train students at SERE school,⁴¹ a memo entitled 'Operational Issues Pertaining to the Use of Physical/Psychological Coercion in Interrogation',⁴² and a memo entitled 'Psychological Effects of Resistance Training'.⁴³

The Armed Services Committee Report discusses three risks associated with the use of aggressive interrogations highlighted in the second memo: that the use of such techniques may result in detainees not cooperating with interrogators,⁴⁴ that any intelligence obtained may not be reliable,⁴⁵ and that the use of such techniques may have the effect of increasing the likelihood of them being used against US personnel in the future.⁴⁶ However, whilst the report does quote all but the first sentence of the first paragraph of a section entitled 'Operational Concerns', it fails to note the point made in the first sentence: JPRA had already noted that 'upwards of 90 percent of interrogations have been successful through the exclusive use of a direct approach, where a degree of rapport is established with the prisoner'.⁴⁷ If it is to be accepted that the DoD General Counsel's Office was to try and find out how to conduct effective interrogations, as Shiffrin said was the case, it is difficult to see how the DoD would end up pursuing a policy which runs contrary to JPRA's accumulated knowledge that interrogations based on rapport-building are more effective than those where aggressive techniques are used.

The third memo provided to the DoD General Counsel's Office by JPRA, makes comments in relation to two areas – the general psychological effects of SERE

⁴⁰ *ibid*

⁴¹ Armed Services Committee Report (n 1) 27-28

⁴² *ibid* 28

⁴³ *ibid* 29

⁴⁴ *ibid* 28

⁴⁵ *ibid*

⁴⁶ *ibid* 29

⁴⁷ Joint Personnel Recovery Agency, 'Operational Issues Pertaining to the Use of Physical/Psychological Coercion in Interrogation' (25 July 2002) <https://www.washingtonpost.com/wp-srv/nation/pdf/JPRA-Memo_042409.pdf> (Last accessed 15 May 2021), 1

training on students at the US Air Force's SERE School and the impact of the waterboard. In relation to the general impact of SERE training, Ogrisseg states, 'historically, a small minority of students in USAF Resistance Training (RT) have had temporary adverse reactions',⁴⁸ and that between 1992 and 2001, 'Out of the entire student population, only 0.14% were psychologically pulled from training'.⁴⁹ Ogrisseg additionally stated that even though there had not been any long-term studies of the effects of RT during his tenure, he did not believe that the training caused long-term harm because of post-training briefings, open group discussion and a lack of official complaints.⁵⁰ In a written response to a question from Senator Carl Levin regarding his conclusions on the point of long-term harm, Ogrisseg clarified his comments, stating:

"The conclusion in my July 24, 2002, memo to Lieutenant Colonel Baumgartner was very specific to medically and psychologically screened personnel with medical and psychological staff monitoring the training and immediately able to intervene if necessary. There are a number of important differences between SERE school and real world interrogations that would limit my conclusions to the SERE school training populations."⁵¹

Over the course of three pages, Ogrisseg provides several reasons why his conclusions would not apply to real world interrogations. These include: (1) the lack of extensive psychological and physical screening of detainees compared to the thorough screening of SERE School students;⁵² (2) the difference in nature between the learning experience of SERE school and intelligence gathering interrogations;⁵³ (3) differences between oversight functions in schools and interrogation facilities;⁵⁴ (4) the risk for the dehumanisation of

⁴⁸ Jerald F Ogrisseg, 'Psychological Effects of Resistance Training' (24 July 2002) <<https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020724.pdf>> (Last accessed 15 May 2021), para 2

⁴⁹ *ibid*

⁵⁰ *ibid* para 4

⁵¹ United States Armed Services Committee Hearing (n 38) 148

⁵² *ibid*

⁵³ *ibid* 149

⁵⁴ *ibid*

detainees;⁵⁵ (5) the lack of an opportunity for detainees to have debriefings;⁵⁶ (6) the fact that real world interrogations are not voluntary;⁵⁷ and (7) the difference between SERE school being a short experience versus a potentially indefinite interrogation experience.⁵⁸

Ogrisseg's clarification of this advice is important because the statistics included in the memo are cited in a 1 August 2002 Memo from Jay Bybee to the CIA's Acting General Counsel John Rizzo as part of the case to justify the use of a number of techniques, including walling, stress positions, and sleep deprivation,⁵⁹ in the interrogation of Abu Zubaydah.⁶⁰ The SERE influence on the CIA's proposed interrogation in this case is clear with Bybee stating, 'these same techniques, with the exception of the insect in the cramped confined space, have been used and continue to be used on some members of our military personnel during their SERE training.'⁶¹ This highlights that the failures exhibited as a result of the DoD's reliance on SERE tactics in the interrogation policy formulation process were also evident in the CIA's development of policy.⁶²

With reference to the second point in Ogrisseg's memo, regarding the use of the waterboard, Ogrisseg stated:

⁵⁵ *ibid* 149-50

⁵⁶ *ibid* 150

⁵⁷ *ibid*

⁵⁸ *ibid*

⁵⁹ Jay S Bybee, 'Memorandum for John Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Interrogation of al Qaeda Operative*' (Office of Legal Counsel, 1 August 2002) <<https://www.justice.gov/olc/file/886076/download>> (Last accessed 15 May 2021), 5. The full list of proposed interrogation techniques can be found at 2-4. This memo was not subject to analysis by the Senate Armed Services Committee as it was classified when the report was written: Armed Services Committee Report (n 1) 34. The memo was subsequently released to the public in April 2009: United States Department of Justice, 'Department of Justice Releases Four Office of Legal Counsel Memos' (United States Department of Justice, 16 April 2009) <<https://www.justice.gov/opa/pr/departments-justice-releases-four-office-legal-counsel-opinions>> (Last accessed 15 May 2021)

⁶⁰ The Bybee Memo states that Zubaydah was captured on the basis that he was 'one of the highest ranking members of the al Qaeda terrorist organization, with which the United States is currently engaged in an international armed conflict following the attacks on the World Trade Center and Pentagon on September 11, 2001': Bybee Memo (n 59) 1

⁶¹ *ibid* 4

⁶² The CIA's interrogation policy will be discussed in the next section.

“I observed the watering board being utilized approximately 10-12 times when I was conducting a Staff Assistance Visit to the Navy North Island SERE School in September of 2001. The effects of the pressure were highly predictable. Use of the watering board resulted in student capitulation and compliance 100% of the time. I do not believe the watering board posed a real and serious physical danger to the students when I observed... Psychologically, however, the watering board broke the students’ will to resist providing information and induced helplessness”.⁶³

In respect of the information provided by Ogrisseg, it seems that the assertions made regarding its effectiveness did not match up with the real world use of the waterboard. In the context of the CIA’s detention and interrogation program where the use of the waterboard was approved in the Bybee memo referred to above,⁶⁴ the Office of Medical Services stated the following in relation to the effectiveness of the waterboard in their September 2003 Draft Guidelines:

“While SERE trainers believe that trainees are unable to maintain psychological resistance to the waterboard, our experience was otherwise. Subjects unquestionably can withstand a large number of applications, with no seeming cumulative impact beyond their strong aversion to the experience. Whether the waterboard offers a more effective alternative to sleep deprivation and/or stress positions or is an effective supplement to these techniques is not yet known.”⁶⁵

⁶³ Ogrisseg (n 48) para 5b

⁶⁴ Bybee (n 59). This was in part because the techniques proposed were determined, at 11, not to cause ‘severe physical pain or suffering’, and, at 15, were determined not to result in ‘severe mental pain or suffering’ as required for the offence of torture under 18 US Code s.2340.

⁶⁵ Office of Medical Services, ‘Draft OMS Guidelines on Medical and Psychological Support to Detainee Operations’ (4 September 2003) in Central Intelligence Agency Office of Inspector General, ‘Special Review: Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003), Report No. 2003-7123-IG (7 May 2004) <<https://www.cia.gov/readingroom/docs/0005856717.pdf>> (Last accessed 15 May 2021), Appendix F, page 8

Additionally, with reference to physical harm, the OMS stated that risks included ‘respiratory arrest associated with laryngospasm’,⁶⁶ possible pneumonia in cases of aspiration,⁶⁷ or in cases of extended use of the waterboard, it is possible that ‘for reasons of physical fatigue or psychological resignation, the subject may simply give up, allowing excessive filling of the airways and loss of consciousness.’⁶⁸ In relation to mental harm, the guidelines state there is a possibility of conditions such as Post Traumatic Stress Disorder developing.⁶⁹ O’Mara further notes that:

“At a minimum, waterboarding deliberately interrupts the voluntary control of breathing and imposes a life-threatening stress by directly interrupting the breathing cycle. It will invoke and induce reflexes that are beyond voluntary control. It changes oxygen and carbon dioxide concentrations, including hypoxia (decreases in blood oxygen levels) and hypercapnia (increases in blood concentration of carbon dioxide).”⁷⁰

The waterboard as a technique is not specifically relevant to the discussion of the approved techniques in the DoD’s detention and interrogation program since it was never specifically authorised in either the December 2002 approval of techniques approved for use at Guantanamo Bay (to be discussed below in the context of Afghanistan) or in the April 2003 endorsement of interrogation techniques following the conclusion of the work of a DoD Working Group.⁷¹ This is the case even though the OTP alleges that the waterboard was used by members of the US armed forces.⁷² The discussion of whether the waterboard

⁶⁶ *ibid* Appendix F, page 9

⁶⁷ *ibid*

⁶⁸ *ibid*

⁶⁹ *ibid* Appendix F, 10

⁷⁰ Shane O’Mara, *Why Torture Doesn’t Work: The Neuroscience of Interrogation* (Harvard University Press 2015), 178

⁷¹ William J Haynes II, ‘Counter-Resistance Techniques’ (27 November 2002) <<https://nsarchive2.gwu.edu/torturingdemocracy/documents/20021127-1.pdf>> (Last accessed 15 May 2021); Donald Rumsfeld, ‘Counter-Resistance Techniques in the War on Terrorism’ (16 April 2003) <<https://nsarchive2.gwu.edu/torturingdemocracy/documents/20030416.pdf>> (Last accessed 15 May 2021)

⁷² OTP Afghanistan investigation request (n 3) para 193. The Armed Services Committee Report (n 1) provides no assistance on any unauthorised use of the waterboard in the context of Afghanistan – the only times the word ‘waterboard’ are mentioned in sections pertaining to Afghanistan are in the context of the Navy SERE school’s use of the waterboard at 226.

is effective and safe does, however, provide an insight about the development of detention and interrogation policy.

It is clear that the results of reliance on SERE techniques is that it is impossible to gain a full picture of whether the use of proposed techniques are either effective or harmful. It appears that the reason for this is limited experience of the use of the techniques in live interrogations. The OMS draft guidelines for example highlight that at most, a SERE student will be subjected to the waterboard on at most two occasions,⁷³ and that a SERE trainee is likely to be fitter than a detainee, though the guidelines state 'the procedure nonetheless carries some risks, particularly when repeated a large number of times or when applied to an individual less fit than a typical SERE trainee'.⁷⁴ This seeming disconnect between the effects of techniques applied in live interrogations versus the application of techniques designed to build resistance against interrogations in a training environment raises questions about the extent to which the United States ever wanted to conform with long-standing legal norms, or whether the US wanted to justify an aggressive interrogation program no matter what.

However, beyond stating that a reason behind the request for information from JPRA was the potential to modify SERE school techniques for use in real life interrogations, the Armed Services Report does not elaborate on why it was deemed to be acceptable to contact an organisation, in JPRA, which is oriented on the protection of US personnel for the purposes of developing an interrogation policy. This is a prudent factor to consider when JPRA personnel admit that the use of SERE techniques would constitute a breach of the Geneva Conventions, especially when the program was developed at a time when President Bush had declared that the Geneva Conventions did not apply in the conflict with Al Qaeda and the Taliban.⁷⁵

⁷³ September 2003 OMS Draft Guidelines (n 65) Appendix F page 8

⁷⁴ *ibid* Appendix F page 9

⁷⁵ George W Bush, 'Humane Treatment of al Qaeda and Taliban Detainees' (7 February 2002) <<https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020207-2.pdf>> (Last accessed 15 May 2021)

It seems difficult, therefore, to establish how the present Report can be used as a means of holding people accountable for alleged wrongdoing if it is not able to answer the question of why the DoD's detention and interrogation policy developed in the way that it did; the Report merely presents the development of policy as a matter of fact.

ii. The Transfer of Policy from Guantanamo Bay to Afghanistan

JPRA had already begun the process of trying to develop their role in the interrogation of detainees prior to the DoD's July 2002 request for information on SERE techniques. In February 2002, following the completion of a paper on how to defeat Al Qaeda resistance measures written by James Mitchell and Bruce Jessen, JPRA Commander Colonel Randy Moulton had already written an email to commanders across the US military stating that JPRA was able to provide courses on interrogation resistance.⁷⁶ Additionally, Jessen had been asked by Moulton to prepare a plan for how JPRA should integrate itself into the interrogation process,⁷⁷ though the Armed Services Committee states that it is unclear to what extent this plan was ever utilised.⁷⁸ Furthermore, JPRA began providing training to bodies such as the Defense Intelligence Agency,⁷⁹ the CIA,⁸⁰ and personnel deployed at Guantanamo Bay.⁸¹

Those attending training conducted in September 2002 included members of the Behavioral Science Consultation Team at Guantanamo Bay,⁸² who would go on to produce a memo proposing an interrogation policy for Guantanamo Bay.⁸³ The Armed Services Committee state that the 11 October 2002 memo which requested permission for the use of 18 different interrogation techniques at Guantanamo Bay 'was largely drawn from the October 2, 2002 memorandum

⁷⁶ Senate Armed Services Committee Report (n 1) 7

⁷⁷ A discussion of the interrogation plan is available *ibid* 14-16

⁷⁸ *ibid* 16

⁷⁹ Training to the DIA was provided in March 2002, for a discussion of this training see *ibid* 8-11

⁸⁰ See a discussion of training provided in July 2002 *ibid* 19-23

⁸¹ One example of this training took place at Fort Bragg in September 2002, for a discussion of this training see *ibid* 43-49

⁸² *ibid* 43

⁸³ *ibid* 50-52

that the GTMO Behavioral Science Consultation Team (BSCT) had written upon their return from the JPRA training at Fort Bragg'.⁸⁴ The 18 proposed interrogation techniques included within the memo are broken down into three categories.⁸⁵

In relation to Category I, for which it is stated 'the detainee should be provided a chair and the environment should be generally comfortable',⁸⁶ 2 types of technique were proposed: the detainee could be shouted at,⁸⁷ and the interrogator could use 'techniques of deception'.⁸⁸ In relation to Category II techniques, which the Armed Services Committee state bear a strong resemblance to SERE techniques,⁸⁹ 12 techniques were proposed which include stress positions, exploitation of phobias and hooding.⁹⁰ Four Category III tactics, which required approval by the Commanding General of United States Southern Command, were proposed: tactics to convince the detainee that they or their family were facing the threat of death,⁹¹ 'exposure to cold weather or water',⁹² 'use of a wet towel and dripping water to induce the misperception of suffocation',⁹³ and 'use of mild non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing'.⁹⁴ A number of the techniques listed within Categories II and III are amongst those listed by the OTP as being alleged to have been committed by US military personnel in the perpetration of both torture and outrages upon personal dignity as war crimes under Articles 8(2)(c)(i) and 8(2)(c)(ii) of the Rome Statute respectively.⁹⁵

⁸⁴ *ibid* 61; Lieutenant Colonel Jerald Phifer, 'Request for approval of Counter-Resistance Strategies' (11 October 2002)

<https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Detainee_Related/Request_for_approval_of_counter-resistance_strategies_08F0130_Final.pdf> (Last accessed 15 May 2021)

⁸⁵ Phifer (n 84)

⁸⁶ *ibid* para 2(a)

⁸⁷ *ibid* para 2(a)(1)

⁸⁸ *ibid* para 2(a)(2)

⁸⁹ Armed Services Committee Report (n 1) 61

⁹⁰ Phifer (n 84) para 2(b)

⁹¹ *ibid* para 2(c)(1)

⁹² *ibid* para 2(c)(2)

⁹³ *ibid* para 2(c)(3)

⁹⁴ *ibid* para 2(c)(4)

⁹⁵ For a full list of techniques alleged to have been used by US military personnel which constitute torture under Article 8(2)(c)(i) of the Rome Statute, see OTP Afghanistan Investigation Request (n 3) paras 193-94, and for a list of techniques alleged to have been used

The use of all Category I and II techniques listed in Lieutenant Colonel Phifer's request for approval, as well as the Category III technique of 'mild non-injurious physical contact' were subsequently approved exclusively for use at Guantanamo Bay by United States Secretary of Defense Donald Rumsfeld on 2 December 2002.⁹⁶ This approval was subsequently withdrawn on 15 January 2003 following concerns surrounding the legality of the approved techniques being raised by the Office of the Navy General Counsel.⁹⁷

However, despite the fact that Donald Rumsfeld's approval of the interrogation techniques applied exclusively to Guantanamo, the initial approval of these interrogation techniques did have an impact on the development of interrogation policy in Afghanistan. On 10 January 2003, the Special Mission Unit Task Force (SMU TF), who had begun conducting interrogations in Afghanistan in October 2002 (previously serving as support to Combined Joint Task Force 180 (CJTF-180) in this role), introduced a new Standard Operating Practice (SOP).⁹⁸ The Armed Services Committee Report highlights similarities with the techniques which Rumsfeld had approved:

“Three of the four techniques approved by the SMU TF – isolation, stress positions, and multiple interrogators – were among those authorized by the Secretary of Defence for use at GTMO on December 2, 2002. The fourth technique – sleep deprivation (defined by the SMU TF as “no less than 4 hours sleep in a 24-hour period”) was, in effect, authorized by the

by US military personnel which constitute outrages upon personal dignity under Article 8(2)(c)(ii) of the Rome Statute, see OTP Afghanistan Investigation Request (n 3) para 206

⁹⁶ Haynes (n 71)

⁹⁷ Donald Rumsfeld, 'Counter-Resistance Techniques' (15 January 2003) <<https://nsarchive2.gwu.edu/torturingdemocracy/documents/20030115-1.pdf>> (Last accessed 15 May 2021). For a discussion of the concerns raised by the Office of the Navy General Counsel, see Armed Services Committee Report (n 1) 105-08, and for the comments of the Navy General Counsel outlining his concerns regarding the December 2002 approval of interrogation techniques, see Alberto Mora, 'Statement for the Record: Office of General Counsel Involvement in Interrogation Issues' (7 July 2004) <https://www.thetorturedatabase.org/files/foia_subsite/mora_memo_july_2004_0.pdf> (Last accessed 15 May 2021)

⁹⁸ Armed Services Committee Report (n 1) 148-49

Secretary on December 2, 2002, when he authorized the use of 20 hour interrogations.”⁹⁹

In the process of creating the SMU TF SOP, two SMU TF legal advisors who worked on the SOP stated that Rumsfeld’s approval of interrogation techniques in December 2002 had impacted their determination of the legality of the techniques proposed.¹⁰⁰ Prior to the implementation of SOPs by the SMU TF on 10 January 2003 (and 24 January 2004 in the case of CJTF-180), interrogation policy in Afghanistan was regulated only by Army Field Manual 34-52.¹⁰¹ The Armed Services Committee Report highlights that redacted memos written by the SMU TF Staff Judge Advocate General noted that the techniques approved ‘could rise to the level of torture if applied in such a way and for such a period of time that it rises to the level of severe physical pain and suffering’.¹⁰² The Report further notes that the redacted memos state ‘we are at risk as we get more ‘creative and stray from standard interrogation techniques and procedures taught at DoD and DA schools and detailed in official interrogation manuals.’¹⁰³ Furthermore, the United States Army, prior to Donald Rumsfeld’s initial approval of interrogation techniques at Guantanamo in December 2002, stated that the proposal of stress positions ‘crosses the line of “humane” treatment, would likely be considered maltreatment under Article 93 of the UCMJ, and may violate the Federal torture statute if it results in severe physical pain or suffering.’¹⁰⁴ This means that techniques permitted by the SMU TF SOP appear to run contrary to previously accepted military interrogation practices, and again raises significant questions about the willingness of the United States to comply with legal norms.

Furthermore, the Armed Services Committee Report makes it clear that the Air Force, Navy, Marine Corps, Army, and Criminal Investigative Task Force all

⁹⁹ *ibid* 153

¹⁰⁰ *ibid* 154

¹⁰¹ *ibid* 154-55; Vice Admiral Albert T Church, ‘Review of Department of Defense Detention Operations and Detainee Interrogation Techniques’ (7 March 2005) <<https://www.therenditionproject.org.uk/documents/RDI/050307-DoD-Church-Report-on-Detention-and-Interrogation-Techniques.pdf>> (Last accessed 15 May 2021), 196

¹⁰² Armed Services Committee Report (n 1) 152

¹⁰³ *ibid* 153.

¹⁰⁴ John Ley, ‘Review – Proposed Counter-Resistance Techniques’, available in United States Armed Services Committee Hearing (n 38) 240

raised significant doubts in relation to the legality of the interrogation techniques, citing both the Uniform Code of Military Justice and the Torture Statute.¹⁰⁵ The DoD's Deputy General Counsel for International Affairs, Eliana Davidson, is also alleged to have told DoD General Counsel Jim Haynes that the request required further examination.¹⁰⁶ Additionally, the Legal Counsel for the Joint Chiefs of Staff, Captain Jane Dalton, was allegedly stopped from carrying out a legal review into the request for approval of interrogation techniques at Guantanamo by DoD General Counsel Jim Haynes because of concerns he had regarding knowledge of the review becoming widespread.¹⁰⁷ Scharf also highlighted that State Department Legal Advisor William H Taft IV was not involved in the policy formulation process.¹⁰⁸ When asked if there was an appearance that they had ignored legal criticisms of proposed interrogation plans, Haynes stated:

“It is erroneous to say that I dismissed the reservations of others. I understand that people have differences of opinion. I understand how those who have the benefit of hindsight and who disagree with policy judgments that were made by the administration can be “troubled” by and continue to disagree with some decisions. There are thousands of lawyers within the DOD. The views of these lawyers are not uniform. They also have differences of opinion. It was my practice, given the constraints of time, resources, and the need-to-know, to listen and appropriately take into consideration the views of civilian and military lawyers within DOD as well as take the views of commanders.”¹⁰⁹

This does not provide an entirely convincing explanation of why Jim Haynes chose to recommend pursuit of a policy which he was warned ran contrary to established United States law. Whilst it is possible that Haynes did not recognise that the policy would have ramifications beyond operations at

¹⁰⁵ Armed Services Committee Report (n 1) 67-70; The Uniform Code of Military Justice is found in 10 US Code Ch 47; The Torture Statute is found in 18 US Code s.2340

¹⁰⁶ Armed Services Committee Report (n 1) 70

¹⁰⁷ *ibid* 70-72

¹⁰⁸ Michael P Scharf, 'International Law and the Torture Memos' (2009) 42 Case Western Reserve Journal of International Law 321, 346

¹⁰⁹ United States Senate Armed Services Committee Hearing (n 38) 155

Guantanamo Bay at the time he recommended the policy in November 2002,¹¹⁰ the extent of the policy should have become clear during the work of the Working Group established by Donald Rumsfeld in January 2003 ‘to assess the legal, policy, and operational issues relating to the interrogations of detainees held by the U.S. Armed Forces in the War on Terrorism’.¹¹¹ This is the case because, as will be discussed below, it was clear from the work of the Working Group that the effects of the policy did not apply only to Guantanamo.

The final point to discuss in relation to this section is the development of interrogation policy in Afghanistan by Combined Joint Task Force 180. As has already been stated, until they introduced their own SOP, they were relying solely upon Army Field Manual 34-52 as their source of authority for interrogation policy. The circumstances by which they introduced their SOP present further questions about the extent to which United States authorities maintained oversight of their interrogation policy in the early years of its operation. On 24 January 2003, the CJTF-180 Deputy Staff Judge Advocate, Lieutenant Colonel Robert Cotell, sent a memo to the Working Group established by Donald Rumsfeld which outlined a range of interrogation techniques that had been used by CJTF-180 in Afghanistan, including the exploitation of phobias, sensory deprivation and hooding.¹¹² Additionally, the Armed Services Committee Report states that Cotell:

“also recommended use of five additional techniques, including “deprivation of clothing” to put detainees in a “shameful, uncomfortable situation;” “food deprivation;” “sensory overload – loud music or temperature regulation;” “controlled fear through the use of muzzled, trained military working dogs;” and “use of light and noise deprivation”.”¹¹³

¹¹⁰ Haynes (n 71)

¹¹¹ Donald Rumsfeld, ‘Detainee Interrogations’ (15 January 2003) <<https://nsarchive2.gwu.edu/torturingdemocracy/documents/20030115-2.pdf>> (Last accessed 15 May 2021)

¹¹² Senate Armed Services Committee Report (n 1) 154-55

¹¹³ *ibid* 155

Cotell stated that he whilst he was aware that Rumsfeld's approval for the use of aggressive interrogation techniques had been revoked, the lack of alternative guidance meant that CJTF-180 considered their policy to be valid.¹¹⁴ The Church Report states that following a lack of response to their memo, 'in the absence of any negative feedback, the CJTF legal staff concluded that the techniques described as being currently employed in the January 24, 2003 memorandum were unobjectionable to higher headquarters and that the memorandum could be considered an approved policy'.¹¹⁵

The Church Report also states that 'in developing techniques, interrogators in Afghanistan took so literally FM 34-52's suggestion to be creative that they strayed significantly from a plain-language reading of FM-34-52'.¹¹⁶ Furthermore, it took until June 2004 for interrogation policy to conform with Field Manual 34-52 once again.¹¹⁷ In this situation, it has to be asked how an interrogation policy based on an approval for techniques which had been rescinded, prior to the policy ever being written, was allowed to remain in force for over a year.

The Armed Services Committee Report does not provide any answers in this respect, which raises further questions as to whether it can be a means by which to say the US has complied with the principle of complementarity since there is no way to ensure accountability for a situation that is not fully understood. However, the findings of the Report do serve to suggest that the Department of Defense failed to effectively maintain oversight of their own detention and interrogation program. This raises the potential for liability under the principle of command responsibility as found in Article 28 of the Rome Statute.¹¹⁸ This is because the continued existence of the policy, in the circumstances described above, suggest that senior officials 'failed to take all necessary and reasonable measures within his or her power to prevent' alleged

¹¹⁴ *ibid* 156

¹¹⁵ Church Report (n 101) 201

¹¹⁶ *ibid* 196

¹¹⁷ *ibid* 7

¹¹⁸ Rome Statute (n 5) Article 28

international crimes from being committed by those under their ‘effective authority and control’.¹¹⁹

iii. Conclusion

Whilst this section has shown that the Armed Services Committee Report does highlight important facts in relation to the development of the DoD’s interrogation policy, particularly in relation to the role played by JPRA/SERE personnel, and the transfer of interrogation policy from Guantanamo Bay to Afghanistan, it does not effectively show that the Report can be a means by which the US can comply with the principle of complementarity in and of itself. A primary reason for that is because the Report does not carry out a thorough examination of why the policy developed and manifested itself in the way that it did in order to try and ensure steps are taken to prevent recurrence. This seems to be especially important in the absence of prosecutions for those determined to be the most responsible for the perpetration of international crimes. In relation to such prosecutions, the OTP states:

“The Prosecution has been unable to obtain specific information with a sufficient degree of specificity and probative value that demonstrates that proceedings were undertaken with respect to cases of alleged detainee abuse by members of the US armed forces in Afghanistan within the temporal jurisdiction of the Court.”¹²⁰

Additionally, the main conclusions of the Armed Services Committee Report in relation to interrogation policy transfer can be seen in the Church Report, as was shown above, and the role of SERE can be seen through the examination of publicly released documents in the context of both the DoD and the CIA. This further demonstrates the limited impact of the Report, and therefore its utility in demonstrating that the US has complied with the principle of complementarity.

¹¹⁹ *ibid* Article 28(b)

¹²⁰ OTP Afghanistan Investigation Request (n 3) para 296

b. The Development of the CIA's Detention and Interrogation Program

The Report of the CIA's Office of the Inspector General, *Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)*, highlights that prior to the commencement of the War on Terror, the CIA's previous involvement in interrogations during the 1980s had to be brought to an end as a result of 'allegations of human rights abuses in Latin America'.¹²¹ Additionally, the CIA handbook states that 'it is CIA policy to neither participate directly in nor encourage interrogation that involves the use of force, mental or physical torture, extremely demeaning indignities or exposure to inhumane treatment of any kind as an aid to interrogation'.¹²²

This suggests that the CIA should have taken special care to ensure that any pursuit of detention and interrogation operations should have been conducted in such a way that it both conformed with the CIA's own policy but also ensured that the mistakes of the past were not repeated (goals which hardly appear to be mutually exclusive). Instead, the CIA operated a detention and interrogation program which resulted in the Senate Intelligence Committee Report concluding that 'the interrogations of CIA detainees were brutal and far worse than the CIA represented to policymakers',¹²³ impeded the operation of accountability mechanisms,¹²⁴ and that 'CIA detainees were subjected to coercive interrogation techniques that had not been approved by the Department of Justice or had not been authorized by CIA Headquarters'.¹²⁵ This section will discuss the findings of the Report and highlight significant weaknesses with the report's ability to be a useful means of ensuring accountability.

It should also be noted that prior to this analysis taking place that the European Court of Human Rights, when adjudicating on cases relating to the CIA's

¹²¹ Central Intelligence Agency Office of Inspector General (n 65) 9-10

¹²² *ibid* 10

¹²³ Intelligence Committee Report (n 2) xii

¹²⁴ *ibid* xiv-xvii

¹²⁵ *ibid* xxi

detention and interrogation program, found that detainees who had been subject to enhanced interrogation techniques had been victims of torture.¹²⁶

i. Quality of Staff

The first point which needs to be highlighted is that the Report makes it clear that the management of Detention Site Cobalt (located in Afghanistan and in operation between September 2002 and April 2004)¹²⁷ raises significant questions about how the CIA managed their detention and operation operations. For example, it is stated that there were concerns surrounding the extent to which the officer placed in charge of Detention Site Cobalt between September 2002 and July 2003,¹²⁸ referred to in the Intelligence Committee Report as '[CIA OFFICER 1]',¹²⁹ could be trusted to carry out his duties. Colleagues stated that [CIA OFFICER 1] had 'issues with judgment and maturity',¹³⁰ and that he had a 'lack of honesty, judgment and maturity'.¹³¹

Additionally, the Report makes it clear that this officer 'was a junior officer on his first overseas assignment with no previous experience or training in handling prisoners or conducting interrogations'.¹³² The Office of the Inspector General Report into the death of Gul Rahman, a detainee who died of hypothermia at Cobalt in November 2002, states that at that time, [CIA OFFICER 1] 'had not

¹²⁶ *Husayn (Abu Zubaydah) v Poland*, App No 7511/13 (ECtHR, 24 July 2014), para 511; *Al Nashiri v Poland*, App no 28761/11 (ECtHR, 24 July 2014), para 516. It was also held that the subsequent conditions of detention faced by Abu Zubaydah and Al Nashiri in Lithuania, and Romania, respectively amounted to inhuman and degrading treatment under Article 3 of the European Convention on Human Rights: *Abu Zubaydah v Lithuania*, App No 46454/11 (ECtHR, 31 May 2018), para 640; *Al Nashiri v Romania*, App No 33234/12 (ECtHR, 31 May 2018), para 675

¹²⁷ Rendition Project, 'CIA Torture Unredacted: Chapter One' (Rendition Project, July 2019) <<https://www.therenditionproject.org.uk/documents/RDI/190710-TRP-TBIJ-CIA-Torture-Unredacted-Ch1.pdf>> (Last accessed 15 May 2021) 36

¹²⁸ Intelligence Committee Report (n 2) 50-55

¹²⁹ *ibid* 50. Despite [CIA OFFICER 1] having been publicly identified, this Chapter will continue to refer to them as [CIA OFFICER 1] in order to maintain consistency with the Senate Intelligence Committee Report: Ken Silverstein, 'The Charmed Life of a CIA Torturer: How Fate Diverged for Matthew Zirbel, AKA CIA Officer 1, and Gul Rahman' (The Intercept, 14 December 2014) <<https://theintercept.com/2014/12/15/charmed-life-cia-torturer/>> (Last accessed 15 May 2021)

¹³⁰ Intelligence Committee Report (n 2) 50

¹³¹ *ibid*

¹³² *ibid*

received interrogation training and was operating the facility with a modicum of Headquarters guidance'.¹³³ The Intelligence Committee Report states that he only became a certified interrogator, in April 2003 after having his practical training requirement waived because of his work at Cobalt.¹³⁴ Furthermore, the Intelligence Committee Report states that in March 2003, [CIA OFFICER 1] was given a bonus for 'consistently superior work',¹³⁵ and the CIA took the decision to not take disciplinary action against [CIA OFFICER 1] because of 'the operational context that existed at the time of Rahman's detention'.¹³⁶

The doubts raised in relation to [CIA OFFICER 1]'s appropriateness to be placed in charge of Detention Site Cobalt were not the only issues raised in relation to officers employed as part of the CIA's detention and interrogation program. The Intelligence Committee Report states in relation to officers employed in 2002 and 2003:

"The Committee identified a number of personnel whose backgrounds include notable derogatory information calling into question their eligibility for employment, their access to classified information, and their participation in CIA interrogation activities. In nearly all cases, the derogatory information was known to the CIA prior to the assignment of the CIA officers to the Detention and Interrogation Program. This group of officers included individuals who, among other issues, had engaged in inappropriate detainee interrogations, had workplace anger management issues, and had reportedly admitted to sexual assault."¹³⁷

The CIA acknowledged in their response to the Intelligence Committee Report that some of the officers referred to in the Report should not have been allowed

¹³³ Central Intelligence Agency Office of Inspector General, 'Death of a Detainee in [Redacted]', (27 April 2005) Report No. 2004-7402-IG <https://www.thetorturedatabase.org/files/foia_subsite/cia_25_29.x.pdf> (Last accessed 15 May 2021), para 9

¹³⁴ Intelligence Committee Report (n 2) 55

¹³⁵ *ibid*

¹³⁶ *ibid* footnote 277. A discussion of this failure to ensure accountability for abuses which occurred in the context of the CIA's Detention and Interrogation Program will take place in the next section.

¹³⁷ *ibid* 59

to be involved in the CIA's detention and interrogation operations but stated that 'much of the derogatory information was not in fact available to senior managers making assignments'.¹³⁸ The CIA further stated that in some instances individuals were appointed as a result of an 'on-the-scene decision'.¹³⁹

Staffing problems were something that dogged the CIA's Detention and Interrogation Program through its history. For example, the Senate Intelligence Committee Report highlights that in April 2005, the Base Chief at Detention Site Black (located in Romania and in operation between September 2003 and November 2005)¹⁴⁰ sent an email to the CIA in which they stated the following:

"With regards to debriefers, most are mediocre, a handful [sic] are exceptional and more than a few are basically incompetent. From what we can determine there is no established methodology as to the selection of debriefers. Rather than look for their best, managers seem to be selecting either problem, underperforming officers or whomever seems to be willing and able to deploy at any given time. We see no evidence that thought is being given to deploying an 'A-Team'."¹⁴¹

This is a problem which also existed at other detention sites. For example, the Senate Intelligence Committee Report states that there were no debriefers present at Detention Site Orange (located in Afghanistan and in operation between April 2004 and September 2006)¹⁴² at times in 2005. Furthermore, multiple requests were made by the Station Chief for more debriefers to be made available.¹⁴³ An Office of the Inspector General Audit from June 2006 stated that 'CIA detention facilities have experienced a shortage of qualified debriefers, which may have negatively impacted intelligence exploitation of

¹³⁸ Central Intelligence Agency, 'CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention and Interrogation Program' (Central Intelligence Agency, 27 June 2013) <https://fas.org/irp/congress/2014_rpt/cia-ssci.pdf> (Last accessed 15 May 2021), Tab B p.43

¹³⁹ *ibid*

¹⁴⁰ Rendition Project (n 127) 36

¹⁴¹ Intelligence Committee Report (n 2) 144

¹⁴² Rendition Project (n 127) 36

¹⁴³ Intelligence Committee Report (n 2) 144

detainees',¹⁴⁴ and that 'a shortage of qualified debriefers at detention facilities is an on-going problem'.¹⁴⁵

The fact that the CIA allowed a situation where they had a lack of (capable) staff to carry out roles in their detention and interrogation program to exist nearly four years after the program began operation presents doubts about the extent to which they were committed to operating a program which resembled an effective intelligence gathering operation, as opposed to a situation where chaos reigned. This is especially the case when it is considered that a Base Chief of one of the CIA's detention sites stated that 'problem, underperforming officers' were being sent to work as debriefers.¹⁴⁶ Additionally, the fact that such staffing problems continued for years makes it difficult to give any credence to one of the CIA's major critiques of the Intelligence Committee Report, that:

"it tars the Agency's entire RDI effort with the mistakes of the first few months... the Study as a whole leads the reader to believe that management shortcomings that marked those initial months persisted throughout the program, which is historically inaccurate"¹⁴⁷

The creation of a program whereby an individual with no interrogation experience is placed in charge of a detention and interrogation facility on their first overseas assignment, where individuals for whom there are serious character doubts are allowed to assume roles within that interrogation program (including the aforementioned detention facility manager), and allowing facilities to operate without sufficient qualified and/or competent staff for years afterwards makes it appear that the CIA at the very least tolerated a situation which created the very real risk that abuses could take place.

¹⁴⁴ Central Intelligence Agency Office of Inspector General, 'Report of Audit: CIA-controlled Detention Facilities Operated Under the 17 September 2001 Memorandum of Notification' (14 June 2006) Report No. 2005-0017-AS

<<https://www.cia.gov/readingroom/docs/0006541721.pdf>> (Last accessed 15 May 2021), 18

¹⁴⁵ *ibid* 20

¹⁴⁶ Senate Intelligence Committee Report (n 2) 144

¹⁴⁷ Central Intelligence Agency (n 138) Tab B p. 1-2

ii. CIA Management Problems

A key factor in why this was the case may rest in the notion there were significant failings in the CIA's management of their detention and interrogation program. One aspect in relation to this can be found in the seeming disconnect between what CIA Headquarters knew about their detention and interrogation program and what was actually taking place at detention and interrogation facilities. For example, in the case of Gul Rahman, who died of hypothermia at Detention Site Cobalt in November 2002.¹⁴⁸ The CIA Office of the Inspector General was critical of false statements made in the official cable sent in relation to Rahman's death, which 'obscured or minimized the circumstances of the death',¹⁴⁹ and 'the absence of adequate supervision'.¹⁵⁰ This meant that when Congress were initially notified of the circumstances of Rahman's death, they were provided incorrect information which subsequently had to be corrected.¹⁵¹

Furthermore, at Detention Site Blue,¹⁵² between 28 December 2002 and 1 January 2003, 'Abd al-Rahman Al-Nashiri, who 'is associated with the planning of the attack on the USS Cole, the 1998 East Africa U.S. Embassy bombings, and a 1997 attempt to smuggle Sagger anti-tank missiles into Saudi Arabia to attack U.S. forces based there',¹⁵³ had an empty handgun pointed at his head and the effect of the gun firing was simulated whilst shackled.¹⁵⁴ Additionally, Al-Nashiri, when naked and hooded, had a revving power drill placed near him.¹⁵⁵ Use of these techniques was not reported to Headquarters because it was believed that these techniques did not meet the reporting threshold,¹⁵⁶ because

¹⁴⁸ For more information, see Central Intelligence Agency Office of Inspector General (n 133) generally

¹⁴⁹ *ibid* para 178

¹⁵⁰ *ibid*

¹⁵¹ *ibid*

¹⁵² Intelligence Committee Report (n 2) 68

¹⁵³ Central Intelligence Agency Office of Inspector General, 'Report of Investigation: Unauthorized Interrogation Techniques at [Redacted]' (29 October 2003) Report No. 2003-7123-IG <<https://www.cia.gov/readingroom/docs/0006541525.pdf>> (Last accessed 15 May 2021), para 19

¹⁵⁴ *ibid* para 7

¹⁵⁵ *ibid* para 54

¹⁵⁶ *ibid* para 55

staff at Detention Site Blue stated that they were aware of similar events taking place at other detention facilities,¹⁵⁷ and because one of the CIA officers involved said they had been told to reduce the number of reports made.¹⁵⁸ In this case, the CIA Office of Inspector General concluded that the techniques used went beyond anything the CIA had previously approved,¹⁵⁹ and that the staff members involved had acted independently of CIA Headquarters.¹⁶⁰

Additionally, the Intelligence Committee Report suggests that the CIA used enhanced interrogation techniques on a number of individuals without the required authorisation, stating:

“Over the course of the CIA program, at least 39 detainees were subjected to one or more of the CIA’s enhanced interrogation techniques. CIA records indicate that there were at least 17 CIA detainees who were subjected to one or more CIA enhanced interrogation techniques without CIA Headquarters approval. This count included detainees who were approved for the use of some techniques, but were subjected to unapproved techniques, as well as detainees for whom interrogators had no approvals to use any of the techniques categorized as “enhanced” or “standard” by the CIA at the time they were applied.”¹⁶¹

The Intelligence Committee Report shows that CIA cables indicated that the 17 individuals subjected to unapproved enhanced interrogation techniques were subject to these practices between 2002 and 2004.¹⁶² Of these 17, it appears that at least 10 were subjected to enhanced interrogation techniques after interrogation guidelines were issued by CIA Director George Tenet in January 2003 which specified when interrogation techniques required approval in order to be used.¹⁶³

¹⁵⁷ *ibid* para 48

¹⁵⁸ *ibid* para 58

¹⁵⁹ *ibid* para 64-65

¹⁶⁰ *ibid* para 67

¹⁶¹ Intelligence Committee Report (n 2) 101

¹⁶² *ibid* 101-03

¹⁶³ George Tenet, ‘Guidelines on Interrogation Conducted Pursuant to the Presidential Memorandum of Notification of 17 September 2001’ (28 January 2003)

<<https://www.cia.gov/readingroom/docs/0006541522.pdf>> (Last accessed 15 May 2021); *ibid*

These interrogation guidelines stated that ‘the use of each specific Enhanced Technique must be approved by Headquarters in advance, and may be employed only by approved interrogators for use with the specific detainee’.¹⁶⁴ In the case of standard techniques, it is stated that ‘whenever feasible, advance approval is required for the use of Standard Techniques by an interrogation team.’¹⁶⁵

For their part, the CIA deny that enhanced techniques were used without approval on 17 individuals, stating, ‘no more than seven detainees received enhanced techniques prior to written Headquarters approval’.¹⁶⁶ Whilst the Intelligence Committee provided an explanation as to why they believe that the explanation provided by the CIA is inaccurate,¹⁶⁷ the distinction between whether the techniques were used without approval on seven or seventeen individuals seems hardly relevant when it is considered that the use of enhanced interrogation techniques were specifically approved as a result of guidance from the Office of Legal Counsel in August 2002 (guidance which as demonstrated in the previous chapter has been subject to much criticism).¹⁶⁸ Additionally, Article 11 of the Torture Convention requires that:

“Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture”.¹⁶⁹

This duty also applies in relation to ‘cruel, inhuman and degrading treatment’ under Article 16 of the Torture Convention.¹⁷⁰ Furthermore. Article 2(2) of the

¹⁶⁴ Tenet (n 163) 2

¹⁶⁵ *ibid* 3

¹⁶⁶ Central Intelligence Agency (n 138) Tab B p. 47

¹⁶⁷ Intelligence Committee Report (n 2) fn 590

¹⁶⁸ *supra* Chapter Two

¹⁶⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (adopted 10 December 1984, entered into force 26 June 1987), Article 11

¹⁷⁰ *ibid* Article 16

Torture Convention states that 'No exceptional circumstances whatsoever... may be invoked as a justification for torture.'¹⁷¹

The fact that there is confusion surrounding the extent to which interrogation techniques were used without required approval highlights concerns surrounding the management of the CIA's detention and interrogation program, as does the fact that the Intelligence Committee's findings that individuals were subjected to unauthorized interrogation techniques were based on documentation from within the CIA. This suggests that CIA personnel were aware of the use of the techniques and chose to allow them to be used regardless; and suggests that, as was the case with the DoD interrogation program, the CIA failed to take reasonable precautions to prevent abuses from taking place and thus open themselves up to potential criminal liability under the principle of command responsibility.¹⁷²

The Intelligence Committee Report highlights a number of instances which raise significant doubts as to whether the instances discussed above illustrate that abuse of detainees was the result of isolated acts by problematic personnel within the CIA or whether these instances were symptomatic of the CIA's general ignorance of their own detention and interrogation program. For example, in relation to Detention Site Cobalt, the Report highlights that in September 2003, the CIA Director George Tenet stated that he was 'not very familiar' with the operations at the detention site;¹⁷³ the CIA's Associate Deputy Director of Operations was 'unaware that the CIA's enhanced interrogation techniques were being used there';¹⁷⁴ and, in August 2003, both the CIA's General Counsel and Deputy Counsel stated that they were unaware of operations at Cobalt.¹⁷⁵

The lack of knowledge of the CIA's senior management of their own detention and interrogation operations in the second half of 2003 came over 6 months

¹⁷¹ *ibid* Article 2(2)

¹⁷² Rome Statute (n 5) Article 28(b)

¹⁷³ Intelligence Committee Report (n 2) 57

¹⁷⁴ *ibid*

¹⁷⁵ *ibid*

after the CIA's introduction of formal interrogation guidelines.¹⁷⁶ The CIA stated in their response to the Intelligence Committee Report that the Counterterrorism Center's (CTC) Renditions Group, who had been placed in charge of the CIA's detention and interrogation program in December 2002 following Rahman's death,¹⁷⁷ 'developed standards and guidelines for operating all CIA-controlled detention and interrogation facilities and monitored adherence to those guidelines'.¹⁷⁸ However, the Head of the CTC Chief Jose Rodriguez stated that Cobalt was not of as much importance as his other responsibilities.¹⁷⁹ In any event, Rodriguez has defended the use of CIA enhanced interrogation techniques on the basis of their relationship with SERE techniques:

“we put AZ in isolation at the black site where he was being held while a set of interrogation techniques based on a U.S. military course called “Survival, Evasion, Resistance, and Escape” (SERE) was developed. Over the years tens of thousands of U.S. Army, Navy, and Air Force personnel have endured the enhanced interrogation techniques of SERE, which include waterboarding. I am convinced that when years later President Obama and his Attorney General said that waterboarding is torture they were referring to the waterboarding method used by the Spanish Inquisition, or by the Japanese during World War II, or the Khmer Rouge in Cambodia – not the waterboarding technique used in SERE. Otherwise hundreds, if not thousands, of U.S. military trainers would be guilty of torture.”¹⁸⁰

This raises significant doubts as to the extent that the CIA's assertion that their detention and interrogation program was 'much better developed and managed after the initial months of RDI activities' since the CIA was unaware of what was

¹⁷⁶ Tenet (n 163)

¹⁷⁷ Intelligence Committee Report (n 2) 55

¹⁷⁸ Central Intelligence Agency (n 138) Tab B p. 2

¹⁷⁹ Intelligence Committee Report (n 2) 57

¹⁸⁰ Jose A Rodriguez Jr, 'Broken Covenant' in Bill Harlow (ed), *Rebuttal: The CIA Responds to the Senate Intelligence Committee's Study of Its Detention and Interrogation Program* (Naval Institute Press 2015), 37. AZ refers to Abu Zubaydah, on whom the use of enhanced interrogation techniques was held by the European Court of Human Rights to amount to torture: *Husayn v Poland* (n 126) para 511

going on at its own detention sites.¹⁸¹ The extent to which there was a lack of awareness of CIA activities on the part of senior management is highlighted by the fact that in their response to the Intelligence Committee Report, with the benefit of hindsight, the CIA stated that they were unable to bring Cobalt up to the standards of their other detention facilities (which have already been shown to have their own problems).¹⁸²

The instances highlighted above only serve to support one of the conclusions of the Intelligence Committee Report, that 'the CIA's management and operation of its Detention and Interrogation Program was deeply flawed throughout the program's duration, particularly so in 2002 and 2003.'¹⁸³ This, however, may be the tip of the iceberg, as the Intelligence Committee Report shows that the CIA attempted to avoid accountability for the operation of their detention and interrogation program.

The Intelligence Committee Report states that in 2004, following the circulation of a draft review of the CIA's detention and interrogation program by the Office of the Inspector General, several members of the CIA's senior management were 'highly critical' of the draft.¹⁸⁴ In particular, the Intelligence Committee Report quotes a memo from CIA General Counsel Scott Muller, which stated that the review provided 'an imbalanced and inaccurate picture of the Counterterrorism Detention and Interrogation Program'.¹⁸⁵ Additionally, the CIA Deputy Director James Pavitt stated that the Draft Review had not focused on the effectiveness of the CIA's detention and interrogation program,¹⁸⁶ though the Intelligence Committee Report states that 'a review of CIA records found that the representations in the Pavitt materials were almost entirely inaccurate'.¹⁸⁷

¹⁸¹ Central Intelligence Agency (n 138) Tab B p. 2

¹⁸² *ibid*

¹⁸³ Senate Intelligence Committee Report (n 2) xix

¹⁸⁴ *ibid* 123

¹⁸⁵ *ibid*, citing Scott W Muller 'Interrogation Program Special Review' (24 February 2004) Doc No. 2003-7123-IG

¹⁸⁶ Senate Intelligence Committee Report (n 2) 123-24

¹⁸⁷ *ibid* 124

Additionally, the Intelligence Committee Report highlights that in July 2005, a memo was sent from CIA Director Porter Goss to the Office of the Inspector General raising concerns about the Office of the Inspector General's work on the operations of the Counterterrorism Center and requesting to delay some aspects of new investigations.¹⁸⁸ The memo states in relation to this point:

“Given its mission, CTC unquestionably must be subjected to rigorous independent oversight. This, in fact, has been the case, as evidenced by the 20 or so ongoing, incomplete OIG reviews directed at the Center. I am increasingly concerned about the cumulative impact of the OIG's work on CTC's performance. As I have said in previous correspondence to you, I believe it makes sense to complete existing reviews, particularly resource-intensive investigations such as those now impacting CTC, before opening new ones. As CIA continues to wage battle in the Global War on Terrorism, I ask that you reschedule these aspects of the new CTC review until a mutually agreeable time in the future.”¹⁸⁹

In their response to the Intelligence Committee Report, the CIA attempt to justify Goss's comments, stating that they came at a time when the Counterterrorism Center's resources were limited,¹⁹⁰ and that ‘The DCIA's request thus sought to strike a balance between the critical missions both OIG and CTC had to perform.’¹⁹¹ Both the CIA and Republican Minority responses to the Intelligence Report seek to downplay the significance of the CIA Director's actions by stating that they ultimately had no impact on the activities of the Office of the Inspector General.¹⁹² The fact that the work of the Office of the Inspector General was not undermined does not justify why the CIA Director sought to delay the Office of the Inspector General. On the one hand it can be argued that the CIA Director did not act in a manner which was not inconsistent with his powers under US law. The Central Intelligence Agency Act 1949, as amended, for example,

¹⁸⁸ *ibid* 124

¹⁸⁹ Saxby Chambliss, Richard Burr and Others, ‘Minority Views of Vice Chairman Chambliss, Senators Burr, Risch, Coats, Rubio and Coburn’ in Senate Intelligence Committee Report (n 2) 654

¹⁹⁰ Central Intelligence Agency (n 136) Tab B p.8

¹⁹¹ *ibid*

¹⁹² *ibid*; Chambliss, Burr and Others (n 189) 651

states that the CIA Director has the power to prevent Office of the Inspector General Investigations:

“The Director may prohibit the Inspector General from initiating, carrying out, or completing any audit, inspection or investigation... if the Director determines that such prohibition is necessary to protect the vital national security interests of the United States.”¹⁹³

On the other hand, the Central Intelligence Agency Act states that one of the duties of the Inspector General is:

“To provide policy direction for, and to plan, conduct, supervise, and coordinate independently, the inspections, investigations, and audits relating to the programs and operations of the Agency to ensure that they are conducted efficiently and in accordance with applicable law.”¹⁹⁴

Additionally, the Act states that the Inspector General has to ‘report to the Attorney General any information, allegation, or complaint received by the Inspector General relating to violations of Federal criminal law that involve a program or operation of the Agency’.¹⁹⁵ Whilst the CIA Director did not actually impact the work of the Inspector General, and regardless the powers held by them, in light of the concerns raised over the course of this Chapter, it should still be a matter of concern that such a request was ever made. This is especially the case since the job of the CIA Office of Inspector General is to ensure that CIA activities conform to US law. This raises questions about the extent to which individuals within the CIA were willing to be held accountable for the actions of the CIA.

¹⁹³ 50 US Code s. 3517(b)(3)

¹⁹⁴ 50 US Code s. 3517(c)(1)

¹⁹⁵ 50 US Code s. 3517(b)(5)

iii. Contractors

In a 27 November 2007 document regarding the use of contractors as interrogators in the CIA's detention and interrogation program, it is stated that 'the unique skill sets necessary for a successful interrogation program did not make it feasible for CIA to create a cadre of long-term experienced staff interrogators'.¹⁹⁶ The document states that the subsequent reliance on contractors occurred because:

"long-term contract interrogators are able to apply a history of program-specific experiences and lessons-learned to maximise interrogation and exploitation efforts. CIA would be unable to replicate this level of experience from a temporary cadre of staff interrogators."¹⁹⁷

Two such contract psychologists, referred to in the Intelligence Committee Report as 'Grayson SWIGERT' and 'Hammond DUNBAR',¹⁹⁸ but actually called James Mitchell and Bruce Jessen played a key part in the development of the CIA's detention and interrogation program from the beginning.¹⁹⁹ The CIA stated in relation to their role:

"Ph.D psychologists, Drs. Mitchell and Jessen played a significant and formative role in the development of CTC's detention and interrogation program and continue to lead in the development of additional psychologically-based strategies to collect threat and actionable intelligence from HVDs in a manner that does not violate any federal law, the US constitution, or any US treaty obligation. They have been

¹⁹⁶ Central Intelligence Agency, 'CIA's Use of Contract Interrogators' (27 November 2007) <https://www.thetorturedatabase.org/files/foia_subsite/13_0.pdf> (Last accessed 15 May 2021), para 3

¹⁹⁷ *ibid* para 4

¹⁹⁸ See for example, Intelligence Committee Report (n 2) 21

¹⁹⁹ See Mark Mazzetti, 'Panel Faults C.I.A. Over Brutality and Deceit in Terrorism Interrogations' (*New York Times*, 9 December 2014) <<https://www.nytimes.com/2014/12/10/world/senate-intelligence-committee-cia-torture-report.html>> (Last accessed 15 May 2021) for information regarding the naming of Mitchell and Jessen. Unlike with [CIA OFFICER 1], this Chapter will refer to Mitchell and Jessen by their actual names as they have been referred to previously in the context of the Senate Armed Services Committee Report, and because documentation from the CIA, which will be cited in this section, refers to them by their actual names.

instrumental in training and mentoring other CIA interrogators and debriefers, and many of the current successes in obtaining information from detainees who are actively trying to withhold or distort it, are due to the interrogations conducted by Drs Mitchell and Jessen.”²⁰⁰

Jessen and Mitchell’s involvement in the CIA’s detention and interrogation program meant that in they were awarded an exclusive contract to provide staff at the CIA’s detention facilities worth \$180 million.²⁰¹ Whilst this contract was cancelled in 2008, their company Jessen, Mitchell, and Associates had been paid over \$75 million by the CIA for services rendered.²⁰² The CIA stated that under their contract, Mitchell, Jessen, and Associates provided ‘100 percent of the security exploitation personnel operating at CIA’s Blacksites, and approximately 80 percent of CIA’s interrogators’.²⁰³

The role of Jessen and Mitchell in the CIA’s detention and interrogation program is clearly illustrated in the Intelligence Committee Report, which confirms that the two psychologists were involved in the CIA’s first interrogation of Abu Zubaydah at Detention Site Green (which falls outside the scope of the OTP’s proposed investigation);²⁰⁴ Jessen was present at Detention Site Cobalt prior to the death of Gul Rahman in November 2002,²⁰⁵ even preparing a psychological assessment of Rahman;²⁰⁶ both Jessen and Mitchell were sent to Detention Site Blue in June 2003 and conducted interrogations there;²⁰⁷ and in June 2007, Jessen and Mitchell were asked to brief Secretary of State Condoleezza Rice on the CIA’s detention and interrogation program in order to alleviate her conditions in relation to the program.²⁰⁸

²⁰⁰ Central Intelligence Agency, ‘Role of Mitchell, Jessen, and Associates in CTC RDG program’ (undated) <https://www.thetorturedatabase.org/files/foia_subsite/14_1.pdf> (Last accessed 15 May 2021), 1

²⁰¹ Intelligence Committee Report (n 2) 168

²⁰² *ibid* 169

²⁰³ Central Intelligence Agency (n 200) 2

²⁰⁴ Intelligence Committee Report (n 2) 40

²⁰⁵ *ibid* 54; Central Intelligence Agency (n 133) 2

²⁰⁶ Central Intelligence Agency (n 133) 2

²⁰⁷ Intelligence Committee Report (n 2) 65-66

²⁰⁸ *ibid* 163

In the *Salim v Mitchell* civil complaint, it was alleged that Mitchell and Jessen are responsible for the war crime of torture and cruel treatment because:

“Defendants entered into an agreement with agents of the United States to design and implement a program for the CIA intended to inflict physical and mental suffering on Plaintiffs. Plaintiffs were tortured and cruelly treated within that program. Defendants participated in or committed wrongful acts in furtherance of said conspiracy and/or joint criminal enterprise, resulting in injury to Plaintiffs.”²⁰⁹

The involvement of Jessen and Mitchell led the President of the American Psychological Association, Nadine Kaslow, to state that ‘if the allegations are true, what this pair did was pervert psychological science to break down and dehumanize detainees in a misguided effort to extract information. It is clear to me that their actions constituted torture.’²¹⁰ Additionally, one of Kaslow’s successors as President of the American Psychological Association, Antonio Puente, stated that Jessen and Mitchell’s involvement in the detention and interrogation operation resulted in them ‘violating the ethics of their profession and leaving a stain on the discipline of psychology.’²¹¹ It should, however, be noted that the role of the American Psychological Association in the US detention and interrogation operations has been subject to criticism, with the Hoffman Report stating:

²⁰⁹ *Salim v Mitchell* (ED Wash, 13 October 2015) Civil Action No. 2:15-CV-286-JLQ Complaint and Demand for Jury Trial <https://www.aclu.org/sites/default/files/field_document/salim_v_mitchell_-_complaint_10-13-15.pdf> (Last accessed 15 May 2021), para 182. This case was eventually settled a month before it was due to go to trial, though the details of the settlement were not released: American Civil Liberties Union, ‘CIA Torture Psychologists Settle Lawsuit’ (American Civil Liberties Union, 17 August 2017) <<https://www.aclu.org/press-releases/cia-torture-psychologists-settle-lawsuit>> (Last accessed 15 May 2021)

²¹⁰ Nadine Kaslow, ‘The Psychology of Torture’ (The Mark News, 22 December 2014) <<http://www.themarknews.com/2014/12/22/the-psychology-of-torture/>> (Last accessed 15 May 2021)

²¹¹ American Psychological Association, ‘APA Reaction to Settlement of Torture Case Against Psychologists Mitchell, Jessen’ (American Psychological Association, 17 August 2017) <<https://www.apa.org/news/press/releases/2017/08/torture-settlement>> (Last accessed 15 May 2021)

“The evidence supports the conclusion that APA officials colluded with DoD officials to, at the least, adopt and maintain APA ethics policies that were not more restrictive than the guidelines that key DoD officials wanted, and that were as closely aligned as possible with DoD policies, guidelines, practices, or preferences, as articulated to APA by these DoD officials... APA simply took the word of DoD officials with whom it was trying to curry favor that no such abuse was occurring, and that future DoD policies and training would ensure that no such abuse would occur. APA officials did so even in the face of clear and strong indications that such abuse had in fact occurred.”²¹²

The CIA, in their response to the Intelligence Committee Report, defended the involvement of Jessen and Mitchell on the basis that between them, they had been involved in SERE training,²¹³ had conducted academic research on resistance techniques,²¹⁴ and they had expertise in ‘non-standard means of interrogation’ which the CIA was lacking in.²¹⁵ The fact that Mitchell and Jessen were allowed to take on such a crucial role based on their knowledge of unconventional interrogation techniques again serves to raise questions about the extent to which the CIA intended to operate a detention and interrogation program which conformed with legal norms. This is especially the case since a CIA review acknowledged, in response to a request from the CIA Inspector General for information regarding the effectiveness of enhanced interrogation:

²¹² David H Hoffman, ‘Report to the Special Committee of the Board of Directors of the American Psychological Association: Independent Review Relating to APA Ethics Guidelines, National Security Interrogations and Torture’ (American Psychological Association, 4 September 2015) <<https://www.apa.org/independent-review/revise-report.pdf>> (Last accessed 20 March 2021), 11. For the response of the American Psychological Association to the report, see American Psychological Association, ‘Subject: Release of the Final Report of the Special Investigator’ (American Psychological Association, 11 July 2015) <<https://www.apa.org/independent-review/final-report-message>> (Last accessed 15 May 2021). The report subsequently led to the departure of senior American Psychological Association officials: Spencer Ackerman, ‘Three senior officials lose their jobs at APA after US torture scandal’ (*The Guardian*, 14 July 2015) <<https://www.theguardian.com/us-news/2015/jul/14/apa-senior-officials-torture-report-cia>> (Last accessed 15 May 2021)

²¹³ Central Intelligence Agency (n 138) Tab B p. 49

²¹⁴ *ibid*

²¹⁵ *ibid*

“There is no objective way to answer the question of efficacy. Because of classification, it is not possible to compare this program with other programs (e.g. law enforcement procedures) which derive information through interrogations. As such, there are no external standards for comparison. And there is the epistemological problem of internal measure of effectiveness.”²¹⁶

In their response to the Intelligence Committee Report, the CIA further state that they ‘should have attempted to develop a more sustained, systematic, and independent means by which to evaluate the effectiveness of the approaches used with detainees’,²¹⁷ but state that such a study would have been difficult to conduct because of a number of factors including variations in detainees and the way in which interrogation methods were applied,²¹⁸ ‘the need for secrecy’,²¹⁹ and ‘the need to devote to mission execution the analytic resources that might have been used in an evaluation program, especially during the years just after 9/11 when CIA was recovering from a depletion of its personnel resources during the 1990s’.²²⁰ The fact that the CIA acknowledge the weaknesses of their detention and interrogation program with the benefit of hindsight but still provide excuses as to why they did not take action only demonstrates further the chaotic nature of the CIA’s detention and interrogation operation. The CIA allowed a program to operate which had incompetent staff, which the leadership of the CIA knew very little about, and which the CIA did not even know if it actually worked.

iv. Conclusion

This section has shown that there is evidence to justify the need to examine the potential criminal liability of senior members of the CIA to account for their role

²¹⁶ Central Intelligence Agency, ‘Response to request from Director for Assessment of EIT effectiveness’ (Central Intelligence Agency, 23 September 2005) <<https://www.cia.gov/readingroom/docs/0006541719.pdf>> (Last accessed 15 May 2021), para 13

²¹⁷ Central Intelligence Agency (n 138) Tab B p. 24

²¹⁸ *ibid*

²¹⁹ *ibid*

²²⁰ *ibid*

in the development of the CIA's Detention and Interrogation Program. However, as will be shown in the next section, the Report only had a limited impact on the debate within the United States surrounding the War on Terror. Therefore, as with the Armed Services Committee Report, it is difficult to see how the Intelligence Committee Report can be used as a means of demonstrating that the United States has complied with the principle of complementarity. This is especially the case when the Senate Intelligence Committee themselves could not agree on the validity of the findings of the Intelligence Committee Report – a number of Republican members of the Intelligence Committee issued a minority response to the Intelligence Committee Report which stated that the Report 'appears to be more of an exercise of partisan politics than effective congressional oversight of the Intelligence Community',²²¹ and that the Report contains 'numerous analytical shortfalls, which ultimately led to an unacceptable number of incorrect claims and invalid conclusions'.²²²

The disagreements on the rationale underpinning the report can also be demonstrated in relation to the discussion of effectiveness. The Senate Intelligence Committee Report states that 'The CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness.'²²³ The Minority Report, however disputes those findings,²²⁴ as do the CIA, who stated that 'the actual impact of the information acquired from interrogations was significant and still supported CIA's judgments about the overall value of the information acquired from detainees'.²²⁵

The focus on effectiveness has been subject to criticism. For example, Amnesty International stated that this disagreement meant that 'The question of accountability for crimes under international law does not get a look in.'²²⁶ Additionally, Johnson, Mora and Schmidt raise an important critique of the

²²¹ Chambliss, Burr and Others (n 189) 555

²²² *ibid* 562

²²³ Intelligence Committee Report (n 2) xi

²²⁴ Chambliss, Burr and Others (n 189) 529

²²⁵ Central Intelligence Agency (n 138) Tab B p. 21

²²⁶ Amnesty International, 'USA Crimes and Impunity' (Amnesty International, April 2015) <<https://www.amnesty.org/download/Documents/AMR5114322015ENGLISH.PDF>> (Last accessed 20 March 2021), 131

Report stating that ‘Despite their disagreements, all these perspectives share one key assumption: that whether torture was good or bad depends on whether or not it “worked”’.²²⁷ Cole was also critical of the focus of the Senate Intelligence Committee, stating that ‘The report should not have focused so much attention on whether the CIA’s tactics worked, and instead should have addressed the more important – and answerable question, namely, whether they were illegal’.²²⁸ Cole additionally states that the Senate Intelligence Committee’s Report focus ‘effectively gave a pass’ to those who devised the policies underlying the US detention and interrogation programs.²²⁹ Jervis concluded that because of the Report’s failings ‘a less political report might have had more influence’,²³⁰ and Zegart argues that ‘the report is likely to remain more a Rorschach test than smoking gun, reinforcing existing views of the past rather than informing them.’²³¹

It is therefore difficult to establish how the principle of complementarity could ever be satisfied by this Report due to the fundamental disagreements which exist regarding the factual basis of the Report. This can be established by the fact that the Istanbul Protocol states that an effective investigation of torture requires ‘clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families’,²³² which cannot be said to have occurred here. Consequently, it would be difficult to determine

²²⁷ Douglas A Johnson, Alberto Mora and Averell Schmidt, ‘The Strategic Costs of Torture: How Enhanced Interrogation Hurt America’ (2016) 95 Foreign Affairs 121, 122

²²⁸ David Cole, ‘On Rereading the Torture Report – SSCI Focus Gave Too Many Perpetrators a Pass’ (Just Security, 22 February 2015) <<https://www.justsecurity.org/20267/rereading-torture-report-ssci-focus-gave-perpetrators-pass/>> (Last accessed 15 May 2021)

²²⁹ *ibid*

²³⁰ Robert Jervis, ‘The Torture Blame Game’ (2015) 94 Foreign Affairs 120, 127

²³¹ Amy Zegart, ‘SSCI Study of the CIA’s Detention and Interrogation Program: A Flawed Report’ (Lawfare, 10 December 2015) <<https://www.lawfareblog.com/ssci-study-cias-detention-and-interrogation-program-flawed-report>> (Last accessed 15 May 2021). Zegart’s conclusions on the Senate Intelligence Committee Report were subject to critique from the Chair of the Committee, Dianne Feinstein, ‘A Reply to Amy Zegart on the SSCI Study of the CIA’s Detention and Interrogation Program’ (Lawfare, 21 December 2015) <<https://www.lawfareblog.com/reply-amy-zegart-ssci-study-cias-detention-and-interrogation-program>> (Last accessed 15 May 2021) This, itself led to a further response from Zegart, who criticised the partisan nature of Feinstein’s rebuttal: Amy Zegart, ‘A Response to Senator Feinstein’ (Lawfare, 21 December 2015) <<https://www.lawfareblog.com/response-senator-feinstein>> (Last accessed 15 May 2021)

²³² Office of the United Nations High Commissioner for Human Rights ‘Istanbul Protocol Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 78

how an investigation which does not meet the standards for an effective investigation of torture could demonstrate a State's willingness to conduct an investigation for the purposes of Article 17(2) of the Rome Statute.²³³

2. The Domestic Response to the Senate Reports

Despite the two reports of the United States Senate which have formed the basis of discussion in this Chapter being valuable sources of information, as can be shown by the Office of the Prosecutor citing each of the reports on multiple occasions in their request to open an investigation in relation to Afghanistan,²³⁴ it is unclear what impact they actually had on criminal investigation and agency reform processes in the United States. This section will discuss the limited nature of the impact made by the United States Senate Reports in turn, beginning with the Armed Services Committee Report.

a. Armed Services Committee Report

Whilst the Armed Services Committee Report highlighted that SERE techniques played a major role in the development of the Department of Defense's interrogation policy in the armed conflict in Afghanistan, the Armed Services Committee Report made no impact on the development of policy removing the possibility of SERE techniques being used in the United States military. The reason for this is that the action to remove the influence of SERE primarily took place prior to the publication of the Armed Services Committee Report in November 2008. An August 2006 report by the Office of the Inspector General for the Department of Defense stated that 'We recommend that the Under Secretary of Defense for Intelligence, in coordination with the Secretary of the Army, expedite the issuance of Army Field Manual 2-22.3, "Human Intelligence Collector Operations."²³⁵ Army Field Manual 2-22.3 was introduced in

²³³ Rome Statute (n 5) Article 17(2)

²³⁴ OTP Investigation Request (n 3)

²³⁵ Office of the Inspector General for the Department of Defense, 'Review of DoD-Directed Investigations of Detainee Abuse' (25 August 2006) Report No. 06-INTEL-10 <<https://media.defense.gov/2016/May/19/2001774103/-1/-1/1/06-INTEL-10.pdf>> (Last accessed 15 May 2021), 21

September 2006.²³⁶ In Chapter 8 of the Field Manual, it is stated that ‘the only authorized interrogation approaches and techniques are those authorized by and listed in this manual, in accordance with the Detainee Treatment Act of 2005.’²³⁷

Additionally, as highlighted in an Office of the Inspector General Field Verification Report, the Under Secretary of Defense for Intelligence had stated in October 2006 that it was their intention to issue a revised version of the Department of Defence Directive relating to interrogations.²³⁸ The resulting Directive, issued in October 2008, stated that the use of SERE techniques was banned.²³⁹ Finally, in June 2009, a memo written by General James Mattis in response to the August 2006 Office of the Inspector General Report stated that ‘SERE techniques for interrogation of personnel in DoD Custody or control is prohibited.’²⁴⁰

The Office for Professional Responsibility’s Report on their investigation into the Office of Legal Counsel’s memos (discussed earlier in this Chapter and in Chapter Two), states that ‘during the course of our investigation significant pieces of information were brought to light by the news media and, more recently, congressional investigations’.²⁴¹ In relation to these memos, the Senate Armed Services Committee concluded that:

“Legal opinions... issued by the Department of Justice’s Office of Legal Counsel (OLC) interpreted legal obligations under U.S. anti-torture laws

²³⁶ United States Army, *Human Intelligence Collector Operations* (Army Field Manual 2-22.3, September 2006) <<https://fas.org/irp/doddir/army/fm2-22-3.pdf>> (Last accessed 15 May 2021)

²³⁷ *ibid* para 8-3

²³⁸ Office of the Inspector General for the Department of Defense, ‘Field Verification – Interrogation and Survival, Evasion, Resistance, and Escape Techniques Recommendation’ (16 April 2010) Report No. 10-INTEL-05 <<https://media.defense.gov/2016/Apr/28/2001774110/-1/-1/1/10-INTEL-05.pdf>> (Last accessed 15 May 2021), 2

²³⁹ *ibid*

²⁴⁰ General James Norman Mattis, ‘Prohibition on the Use of Survival, Evasion, Resistance and Escape (SERE) or Code of Conduct-related techniques for Interrogation Purposes’ (17 June 2009) available in Office of the Inspector General for the Department of Defense (n 238), 10

²⁴¹ Office of Professional Responsibility, ‘Report: 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’ (Office of Professional Responsibility, 29 July 2009) <<https://fas.org/irp/agency/doj/opr-final.pdf>> (Last accessed 15 May 2021), 10

and determined the legality of CIA interrogation techniques. Those OLC opinions distorted the meaning and intent of anti-torture laws, rationalized the abuse of detainees in U.S. custody and influenced Department of Defense determinations as to what interrogation techniques were legal for use during interrogations conducted by U.S. military personnel.”²⁴²

The Office of Professional Responsibility concluded that ‘the Bybee Memo had the effect of authorizing a program of CIA interrogation that many would argue violated the torture statute, the War Crimes Act, the Geneva Convention, and the Convention Against Torture’;²⁴³ that John Yoo ‘knowingly failed to provide a thorough, objective, and candid interpretation of the law’;²⁴⁴ and that Jay Bybee ‘at a minimum, should have known that the memoranda were not thorough, objective, or candid in terms of the legal advice they were providing... and that thus he acted in reckless disregard of his professional obligations’.²⁴⁵

However, despite these findings, Associate Deputy Attorney General David Margolis stated in January 2010, ‘I cannot adopt OPR’s findings of misconduct, and I will not authorize OPR to refer its findings to the state bar disciplinary authorities in the jurisdictions where Yoo and Bybee are licensed’.²⁴⁶ This was the case even though Margolis states that his ‘decision should not be viewed as an endorsement of the legal work that underlies those memoranda’.²⁴⁷

Consequently, despite being considered a valuable source of information and concluding that the OLC memos changed the meaning of torture under United States law, the Armed Services Committee Report does not appear to have been a significant factor in ensuring that those responsible for the creation of those memos should be held to account.

²⁴² Senate Armed Services Committee Report (n 1) xxvii

²⁴³ Office of Professional Responsibility (n 241) 251-52

²⁴⁴ *ibid* 251

²⁴⁵ *ibid* 256

²⁴⁶ David Margolis, ‘Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigations 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’ (5 January 2010) <<https://fas.org/irp/agency/doj/opr-margolis.pdf>> (Last accessed 15 May 2021), 2

²⁴⁷ *ibid*

Finally, it is unclear in the context of Afghanistan whether the Armed Services Committee Report led to any new prosecutions being launched in respect of members of the United States military. The Office of the Prosecutor states in their Afghanistan investigation request:

“Despite a number of efforts undertaken, the Prosecution has been unable to obtain specific information with a sufficient degree of specificity and probative value that demonstrates that proceedings were undertaken with respect to cases of alleged detainee abuse by members of the US armed forces in Afghanistan within the temporal jurisdiction of the Court.”²⁴⁸

This is the case even though the Chairman of the Senate Armed Services Committee, Senator Carl Levin, stated in April 2009:

“I have recommended to Attorney General Holder that he select a distinguished individual or individuals – either inside or outside the Justice Department, such as retired federal judges – to look at the volumes of evidence relating to treatment of detainees, including evidence in the Senate Armed Services Committee’s report, and to recommend what steps, if any, should be taken to establish accountability of high-level officials – including lawyers.”²⁴⁹

The statements of the OTP, made in November 2017, appear to indicate that Senator Levin’s request for accountability measures be pursued against high-ranking officials ultimately resulted in no action being taken. Additionally, Senator Levin’s request came nearly nine months prior to the Associate Deputy Attorney General’s determination that John Yoo and Jay Bybee would not face any action in relation to the Office of Professional Responsibility’s finding of

²⁴⁸ OTP Afghanistan Investigation Request (n 3) para 296

²⁴⁹ Senator Carl Levin, ‘Treatment of Detainees in U.S. Custody’ (*Congressional Record* 155:58, 21 April 2009) <<https://www.congress.gov/111/crec/2009/04/21/CREC-2009-04-21-pt1-PgS4504-2.pdf>> (Last accessed 15 May 2021), S4506

professional misconduct. This also serves to highlight that the most useful aspect of the Senate Armed Services Committee report is that it is a source of information, rather than a method of ensuring accountability in and of itself. The Report undoubtedly provides information about the practices of US personnel during the War on Terror but it is difficult to determine whether any action was taken to ensure that individuals were held responsible for alleged wrongdoing as a direct result of the Report.

b. Intelligence Committee Report

As was the case with the Armed Services Committee Report, it does not appear to be the case that the Intelligence Committee Report contributed to the process of criminal prosecutions. In fact, as was stated previously, the Department of Justice took the decision after the publication of the Report to not pursue any further prosecutions in relation to the CIA's detention and interrogation program, stating to the UN Human Rights Committee that:

“before the SSCI report was released, Mr Durham’s team reviewed the Senate Select Committee’s report as it existed in 2012 to determine if it contained any new information that would change his previous analysis, and determined that it did not.”²⁵⁰

This was the case even though the CIA acknowledged that they had failed to hold individuals responsible for the of unauthorised interrogation techniques, stating in their response to the Intelligence Committee Report:

“The *Study* focuses on the inadequate consequences meted out for line officers who acted contrary to policy in conducting interrogations in the field or in providing the rationale for captures from CTC. To us, an even more compelling concern is that the Agency did not sufficiently broaden and elevate the focus of its accountability efforts to include the more

²⁵⁰ Human Rights Committee, ‘Information received from the United States of America on follow-up to the concluding observations’ (28 November 2017) UN Doc CCPR/C/USA/CO/4/Add.1, para 7. See also Hattem (n 13)

senior officers who were responsible for organizing, guiding, staffing, and supervising RDI activities, especially in the beginning.”²⁵¹

Despite this acknowledgement that there was a lack of accountability within the CIA for past mistakes, the CIA state later on in their response that they did not consider it ‘practical or productive to revisit any RDI-related case so long after the events unfolded’.²⁵² The CIA stated that they instead preferred to examine how future accountability mechanisms should ‘look more broadly at management responsibility and look more consistently at any systemic issues’.²⁵³

Following the publication of the Intelligence Committee Report, Amnesty International stated that ‘Failure to end the impunity and ensure redress not only leaves the USA in serious violation of its international legal obligations, it increases the risk that history will repeat itself’.²⁵⁴ Additionally, the Executive Director of Human Rights Watch Kenneth Roth stated days prior to the end of Barack Obama’s presidency that the Obama Administration’s failure to prosecute those responsible for alleged torture meant that ‘Instead of reaffirming the criminality of torture enshrined in international law, Obama leaves office having sent the lingering message that, should future officials resort to torture, there is little chance they will be held to account’.²⁵⁵

The Office of the Prosecutor stated in their Afghanistan investigation request state in relation to the CIA that:

²⁵¹ Central Intelligence Agency (n 138) Tab B p. 44

²⁵² *ibid* Tab B p. 46

²⁵³ *ibid*

²⁵⁴ Amnesty International (n 226) 140. Other calls for prosecutions can be seen in Maria McFarland Sanchez-Moreno, ‘Time for Criminal Investigations’ (Human Rights Watch, 10 December 2014) <<https://www.hrw.org/news/2014/12/10/time-criminal-investigations>> (Last accessed 15 May 2021); Kenneth Roth, ‘The CIA torturers should be prosecuted’ (*Washington Post*, 12 December 2014) <https://www.washingtonpost.com/opinions/the-cia-torturers-should-be-prosecuted/2014/12/12/f034acae-8159-11e4-9f38-95a187e4c1f7_story.html> (Last accessed 15 May 2021)

²⁵⁵ Kenneth Roth, ‘Obama’s human rights failures could pave the way for Trump’s excesses’ (*Washington Post*, 9 January 2017) <<https://www.washingtonpost.com/posteverything/wp/2017/01/09/obamas-human-rights-failures-could-pave-the-way-for-trumps-excesses/>> (Last accessed 15 May 2021)

“The limited inquiries and/or criminal proceedings that were initiated appear to have been focussed on the conduct of direct perpetrators and to persons who did not act in good faith or within the scope of the legal guidance given by the OLC regarding the interrogation of detainees. The conduct of those who purportedly acted in good faith and within the boundaries of the legal guidance was excluded from the scope of possible prosecution from the outset, regardless of the nature and gravity of that conduct. In addition, no proceedings appear to have been conducted to examine the criminal responsibility of those who developed, authorised or bore oversight responsibility for the implementation by members of the CIA of the interrogation techniques set out in this request.”²⁵⁶

A failure to hold individuals to account, regardless of where they are in the CIA hierarchy or what crimes they are alleged to have committed, based on good faith reliance on legally flawed advice means that it is difficult to determine that the United States has complied with the principle of complementarity. The criminal investigation process will be discussed in more detail in the next chapter.

3. Conclusion

This Chapter has raised significant doubts about the ability to consider that the Reports of the Senate Armed Services and Intelligence Committees can be considered a mechanism through which the United States can demonstrate that it has complied with the principle of complementarity. The simplest reason for this is that, despite highlighting the involvement of senior officials in the development of policy which led to the alleged perpetration of acts of torture or inhuman treatment, the Reports do not appear to have been a significant contributor to the criminal investigation process or have a major impact on the process of institutional reform. In the case of the Intelligence Committee Report, it is not clear how the Report has served to contribute to the debate around

²⁵⁶ OTP Afghanistan Investigation Request (n 3) para 315

torture and cruel treatment in the United States since there appears to have been little agreement between the two political parties about the factual basis of the Report. This means that the most valuable aspect of the United States Senate Reports is the information that they provide for an investigation, such as that being carried out by the OTP, about the development of detention and interrogation operations during the War on Terror. This sentiment appears to be shared by the Office of the Prosecutor since they cited the two reports on numerous occasions.

Chapter Four: Criminal Investigations in the United States

Under Article 17(1) of the Rome Statute, the International Criminal Court (ICC) is unable to assert jurisdiction ‘unless the State is unwilling or unable genuinely to carry out the investigation or prosecution’.¹ In the Burundi admissibility judgment, the Pre-Trial Chamber stated that ‘national investigations that are not designed to result in criminal prosecutions do not meet the admissibility requirements under article 17(1) of the Statute.’² Because the last chapter discussing reports of the United States Senate raised questions in relation to potential liability of those involved in the military and CIA detention and interrogation programs, whilst also raising doubts about how these reports contributed to the process of holding individuals accountable, this chapter will discuss criminal investigative processes in the United States. The discussion will focus on three aspects: criminal investigations themselves, US policies which may serve to limit the potential for people to be held accountable for potential crimes, and the use of executive clemency.

1. Criminal Investigations

In order to satisfy the principle of complementarity, it was held in *Lubanga* 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’.³ Exactly what this duty requires has been clarified in subsequent cases before the ICC with the Court stating in *Gbagbo* that ‘If a State is unable to clearly indicate the contours of its national investigation, the State cannot assert that there exists a conflict of jurisdictions with the Court.’⁴ Additionally, in the *al-Senussi Appeals Chambers* judgment, it was stated that:

¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 17(1)(a)

² *Situation in the Republic of Burundi* (Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into Situation in the Republic of Burundi”) ICC-01/17-9-Red (9 November 2017), para 152

³ *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 (10 February 2006), para 31

⁴ *Prosecutor v Simone Gbagbo* (Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo) ICC-02/11-01/12/12-47-Red (11 December 2014), para 76

“If there is a large overlap between the incidents under investigation, it may be clear that the State is investigating substantially the same conduct; if the overlap is smaller, depending on the precise facts, it may be that the State is still investigating substantially the same conduct or that it is only investigating a very small part of the Prosecutor’s case.”⁵

However, despite calls for prosecutions from UN treaty bodies,⁶ special rapporteurs,⁷ and NGOs,⁸ it is unclear to what extent the US have satisfied the requirements of the principle of complementarity. For example, in their investigation request, the ICC Office of the Prosecutor (OTP) state that:

“the Prosecution has been unable to obtain specific information with a sufficient degree of specificity and probative value that demonstrates that proceedings were undertaken with respect to cases of alleged detainee

⁵ *Prosecutor v Gaddafi and Al-Senussi* (Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”) ICC-01/11-01/11-565 (24 July 2014), para 72

⁶ See, for example, United Nations Committee against Torture, ‘Concluding observations on the combined third to fifth periodic reports of the United States of America’ (19 December 2014) UN Doc CAT/C/USA/CO/3-5, para 12; and Human Rights Committee, ‘Concluding observations on the fourth periodic report of the United States of America’ (23 April 2014) UN Doc CCPR/C/USA/CO/4, para 5

⁷ For example, see the comments of Ben Emmerson: Office of the High Commissioner for Human Rights, ‘Feinstein report: UN expert calls for prosecution of CIA officers and other Government officials’ (Office of the High Commissioner for Human Rights, 9 December 2014) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15397&LangID=E>> (Last accessed 15 May 2021); and Nils Melzer: Office of the High Commissioner for Human Rights, “US must stop policy of impunity for the crime of torture”- UN rights expert’ (Office of the High Commissioner for Human Rights, 13 December 2017) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22532&LangID=E>> (Last accessed 15 May 2021)

⁸ See, for example, Human Rights Watch, ‘US: Senate Report Slams CIA Torture, Lies’ (Human Rights Watch, 10 December 2014) <<https://www.hrw.org/news/2014/12/10/us-senate-report-slams-cia-torture-lies>> (Last accessed 15 May 2021); Amnesty International, ‘USA: Senate summary report on CIA detention programme must not be end of story’ (Amnesty International, 9 December 2014) <<https://www.amnesty.org/en/latest/news/2014/12/usa-senate-summary-report-cia-detention-programme-must-not-be-end-story/>> (Last accessed 15 May 2021); and Jameel Jaffer, ‘Those who approved torture shouldn’t be above the law’ (MSNBC, 12 December 2014) <<https://www.msnbc.com/msnbc/those-who-approved-torture-shouldnt-be-above-the-law-msna479686>> (Last accessed 15 May 2021)

abuse by members of the US armed forces in Afghanistan within the temporal jurisdiction of the Court.”⁹

The OTP make a similar statement in relation to alleged crimes committed in the context of the CIA’s detention and interrogation program.¹⁰

a. The United States Military

In the context of investigations conducted by the US military, the OTP state that ‘the information available typically categorises domestic activity in clusters of statistics.’¹¹ Among the examples of statistics cited by the OTP,¹² is a statement made by the United States to the Human Rights Committee in which it was stated:

“The Department of Defense (DoD) has conducted thousands of investigations since 2001 and it has prosecuted or disciplined hundreds of service members for misconduct, including mistreatment of detainees. For example, 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-judicial punishment or adverse administrative action, and many more were investigated and resulted in action at a lower level. The remainder were determined to be unsubstantiated, lacking in sufficient inculpatory evidence, or were included as multiple counts against one individual.”¹³

⁹ *Situation in the Islamic Republic of Afghanistan* (Public redacted version of “Request for authorisation of an investigation pursuant to Article 15”) ICC-02/17-7-Red (20 November 2017), para 296

¹⁰ *ibid* para 297

¹¹ *ibid* para 301

¹² *ibid* paras 302-07

¹³ Permanent Mission of the United States of America, ‘One-Year Follow-up Response of the United States of America to Priority Recommendations of the Human Rights Committee on its Fourth Periodic Report on Implementation of the International Covenant on Civil and Political Rights’ (Office of the High Commissioner for Human Rights, 1 April 2015) <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_FCO_USA_19957_E.pdf> (Last accessed 15 May 2021), para 8

In this regard, the OTP state that ‘Specific public information on the incidents and persons forming the subject of those proceedings is, however, scant’,¹⁴ and that they were ‘unable to identify any individual in the armed forces prosecuted by courts martial for the ill-treatment of detainees within the Court’s temporal and territorial jurisdiction.’¹⁵ This is the case even though the United States told the United Nations Committee against Torture that ‘the U.S. Armed Forces conduct prompt and independent investigations into all credible allegations concerning mistreatment of detainees.’,¹⁶ and a 2013 Defense Legal Policy Board Report stated that ‘Since the initiation of Operation Enduring Freedom in 2001, the Services have demonstrated increasing proficiency in the administration of military justice in the deployed environment’.¹⁷ It should, however, be noted that Rosenblatt shows that only 7 courts-martial took place in Afghanistan in 2003-04 when the OTP states that offences committed by the military ‘primarily’ took place.¹⁸

Whilst Rosenblatt does highlight logistical reasons why courts-martial did not take place early in the armed conflict in Afghanistan,¹⁹ it is not clear to what extent US prosecutorial efforts could be considered to have satisfied the principle of complementarity. This is especially the case since the US have admitted to reliance on the use of non-judicial punishment. Under Article 15 of the Uniform Code of Military Justice, non-judicial punishments can be imposed

¹⁴ OTP Afghanistan investigation request (n 9) para 306. See also Marshall L Wilde, ‘Incomplete Justice: Unintended Consequences of Military Nonjudicial Punishment’ (2007) 60 Air Force Law Review 115, 120 for a discussion of how public records related to non-judicial punishment are not publicly disclosed.

¹⁵ OTP Afghanistan investigation request (n 9) para 306

¹⁶ United Nations Committee against Torture, ‘Third to fifth periodic reports of States parties due in 2011: United States of America’ (4 December 2013) UN Doc CAT/C/USA/3-5, para 129. See also, Human Rights Committee, ‘Fourth periodic report: United States of America’ (22 May 2012) UN Doc CCPR/C/USA/4, para 539; and Permanent Mission of the United States of America (n 13) para 7

¹⁷ Defense Legal Policy Board, ‘Report of the Subcommittee on Military Justice in Combat Zones: Military Justice in cases of U.S. Service members alleged to have caused the death, injury or abuse of non-combatants in Iraq or Afghanistan’ Defense Legal Policy Board, 30 May 2013) <<https://www.hsdl.org/?view&did=743021>> (Last accessed 15 May 2021), 91

¹⁸ OTP Afghanistan investigation request (n 9) para 189; Franklin D Rosenblatt, ‘Awakening Self-Interest: American Military Justice in Afghanistan and Iraq’ in Morten Bergsmo and SONG Tianying (eds), *Military Self-Interest in Accountability for Core International Crimes* (2nd edn, Torkel Opsahl Academic EPublisher 2018), 296

¹⁹ Rosenblatt (n 18) 299-306

for 'minor offences without the intervention of a court-martial'.²⁰ The 2002 Manual for Courts-Martial states that 'Ordinarily, a minor offence is an offense which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial.'²¹ The 2002 Manual further states that 'Nonjudicial punishment is a disciplinary measure more serious than the administrative corrective measures... but less serious than trial by court-martial.'²²

However, in a 2006 Report, the Center for Human Rights and Global Justice, Human Rights First and Human Rights Watch state that:

"Even though non-judicial hearings are meant to adjudicate minor offenses and can result only in relatively weak penalties like reprimands, in practice, commanders in Iraq, Afghanistan, and at Guantánamo Bay have used these hearings in numerous cases that warranted criminal prosecution. DAA Project researchers found that in over seventy instances, commanders who were faced with evidence that supported criminal prosecution chose instead to impose non-judicial punishments or to use non-punitive administrative actions... Many of the personnel punished were implicated in serious abuses, including over ten personnel implicated in homicide cases, and approximately twenty personnel implicated in assault cases. Little is known about the results of non-judicial proceedings and other administrative processes, because the military refuses to release information about them."²³

²⁰ 10 US Code s.815(b).

²¹ Joint Service Committee on Military Justice, *Manual for Courts-Martial United States (2002 Edition)* (Joint Service Committee on Military Justice, 2002) <https://www.loc.gov/rr/frd/Military_Law/pdf/manual-2002.pdf> (Last accessed 15 May 2021), Part V, page 1

²² *ibid.* For a general discussion of non-judicial punishments, see Katherine Gorski, 'Nonjudicial Punishment in the Military: Why a Lower Burden of Proof Across All Branches is Unnecessary' (2013) 2 National Law Security Review 83

²³ Center for Human Rights and Global Justice, Human Rights First and Human Rights Watch, 'By the Numbers: Findings of the Detainee Abuse and Accountability Project' (Human Rights Watch, April 2006) <<https://www.hrw.org/sites/default/files/reports/ct0406webwcover.pdf>> (Last accessed 15 May 2021), 14.

There are further issues in relation to the use of non-judicial punishments and the nature of punishment imposed. For example, Wilde highlights that ‘nonjudicial punishment under Article 15 does not result in a conviction for the accused’;²⁴ and that the rights of victims in relation to non-judicial punishment are limited.²⁵ Additionally, the 2013 Defense Legal Policy Board Report notes that ‘the Services currently have different standards of proof for non-judicial punishment’,²⁶ which Reeves argues ‘is contrary to the intent of the drafters of the UCMJ and specifically Article 15’.²⁷ Reeves additionally states that:

“The use of different burdens of proof by the separate military branches raises serious concerns about Article 15 proceedings. These concerns are most evident in joint operations where servicemembers under the same command who commit the same misconduct may receive different dispositions.”²⁸

The Defense Legal Policy Board Report, however, states that ‘it was unable to reach a consensus as to whether increased uniformity was appropriate and if so, what the proper standard should be’,²⁹ though the matter was deemed to be worthy of ‘further study’.³⁰

Whilst the Department of Defense Law of War Manual states that ‘In some cases, it may be appropriate to administer non-judicial punishment in order to punish and repress violations of the law of war’,³¹ the use of non-judicial punishments combined with the OTP’s inability to determine whether the US has conducted prosecutions in relation to members of the armed forces

²⁴ Wilde (n 14) 119

²⁵ *ibid* 120

²⁶ Defense Legal Policy Board Report (n 17) 108

²⁷ Shane Reeves, ‘The Burden of Proof in Nonjudicial Punishment: Why Beyond a Reasonable Doubt Makes Sense’ [2005] 2005(11) *Army Lawyer* 28, 29

²⁸ *ibid* 38

²⁹ Defense Legal Policy Board Report (n 17) 109

³⁰ *ibid*

³¹ Department of Defense Office of General Counsel, *Department of Defense Law of War Manual June 2015 (Updated December 2016)* (Department of Defense 2016) <<https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>> (Last accessed 15 May 2021), 1117

allegedly responsible for war crimes raises questions about the extent to which the US has complied with the principle of complementarity. This is especially the case in light of the Pre-Trial Chamber's comments in the Burundi admissibility decision regarding the type of investigations which do satisfy complementarity. Furthermore, in relation to the use of such measures by the United States, the Pre-Trial Chamber stated in their Afghanistan decision that 'national proceedings designed to result in non-judicial and administrative measures rather than criminal prosecutions do not result in inadmissibility under article 17'.³²

b. The CIA

In their investigation request, the OTP cited just one prosecution and a limited number of investigations not resulting in prosecution as examples of actions that had been taken by the United States to investigate crimes allegedly committed in the context of the CIA's detention and interrogation program.³³ This is the case even though the CIA stated in their response to the Senate Intelligence Committee Report that 'we acknowledge that, particularly in the cases cited in the Study's Conclusion, the narrow scope of CIA's accountability efforts yielded outcomes that are, in retrospect, unsatisfying in view of the serious nature of the events.'³⁴ In relation to the internal accountability processes deployed, the CIA state:

"In the RDI-related reviews, some of the officers assessed as accountable received disciplinary actions including one and two year prohibitions on promotion or any form of monetary recognition. Disciplinary actions at the level of Letters of Reprimand or above are permanently maintained in the security files of the disciplined officers. Other officers received oral admonitions and letters of warning; these

³² *Situation in the Islamic Republic of Afghanistan* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17-33 (12 April 2019), para 79

³³ OTP Afghanistan Investigation Request (n 9) paras 316-23

³⁴ Central Intelligence Agency, 'CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention and Interrogation Program' (27 June 2013) <https://fas.org/irp/congress/2014_rpt/cia-ssci.pdf> (Last accessed 15 May 2021), Tab B p. 45

individuals were those with a lesser degree of involvement in the matters under review. Some of the officers assessed as accountable were either not recommended for disciplinary action or recommended for lesser disciplinary actions, due to mitigating factors that included whether these officers had been provided appropriate guidance from CIA Headquarters; had sought, but not received, adequate guidance; or were found not to have acted with malice.”³⁵

The CIA also stated that a contractor was placed on a ‘contractor watchlist’,³⁶ and cite the conviction noted by the OTP.³⁷ The prosecution cited by both the OTP and the CIA is that of David Passaro, who was sentenced to eighty months in prison for his role in the death of an Afghan detainee.³⁸

However, despite acknowledging that accountability was lacking, the CIA appear reticent about the prospects of further attempts to hold people accountable, stating that ‘we do not believe it would be practical or productive to revisit any RDI-related case so long after the events unfolded’.³⁹ This reticence appears to have been shared by the United States government, as when announcing ‘a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations’,⁴⁰ Attorney General Eric Holder stated:

“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

³⁵ *ibid*

³⁶ *ibid* Tab B p. 44

³⁷ *ibid*

³⁸ Gene Cherry, ‘Ex-CIA contractor gets 8 years for prisoner abuse’ (Reuters, 14 February 2007) <<https://www.reuters.com/article/us-afghan-usa-cia/ex-cia-contractor-gets-8-years-for-prisoner-abuse-idUSN1322250620070214>> (Last accessed 15 May 2021); United States Attorney’s Office Eastern District of North Carolina ‘Government Contract Employee Re-Sentenced for Assault Charge’ (United States Department of Justice, 6 April 2010) <<https://www.justice.gov/archive/usao/nce/press/2010/2010-apr-06.html>> (Last accessed 15 May 2021); OTP Afghanistan investigation request (n 9) para 318; *ibid*.

³⁹ CIA Response to Senate Intelligence Committee Report (n 34) Tab B p. 46

⁴⁰ United States Department of Justice, ‘Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees’ (United States Department of Justice, 24 August 2009) <<https://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees>> (Last accessed 15 May 2021)

legal advice given by the Office of Legal Counsel regarding the interrogation of detainees. I want to reiterate that point today, and to underscore the fact that this preliminary review will not focus on those individuals.”⁴¹

This review ultimately resulted in no prosecutions being pursued.⁴² This is the case even though President Obama would later admit in 2014, ‘we tortured some folks. We did some things that were contrary to our values.’⁴³ In a 2015 Report, Amnesty International were critical of the scope of the review announced by Holder, stating that it ‘amounts to a de facto amnesty for crimes under international law.’⁴⁴ Human Rights Watch also raised criticism of the scope of review, stating:

“The Durham investigation was primarily focused only on CIA abuse that went beyond what was authorized. This limitation was always too narrow in scope because the authorization not only permitted interrogation methods in violation of US and international law, but also appear to have been designed specifically to create a legal escape hatch for what would otherwise be the illegal use of torture.”⁴⁵

Human Rights Watch were also critical of the failure of the investigative team to conduct interviews of alleged torture victims.⁴⁶ This criticism was shared by the

⁴¹ *ibid.* See also, White House, ‘Statement of President Barack Obama on Release of OLC Memos’ (White House, 16 April 2009) <<https://obamawhitehouse.archives.gov/the-press-office/statement-president-barack-obama-release-olc-memos>> (Last accessed 15 May 2021)

⁴² United States Department of Justice, ‘Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees’ (United States Department of Justice, 30 August 2012) <<https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees>> (Last accessed 15 May 2021)

⁴³ White House, ‘Press Conference by the President’ (White House, 1 August 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/press-conference-president>> (Last accessed 15 May 2021)

⁴⁴ Amnesty International, ‘USA Crimes and Impunity’ (Amnesty International, April 2015) <<https://www.amnesty.org/download/Documents/AMR5114322015ENGLISH.PDF>> (Last accessed 15 May 2021), 14

⁴⁵ Human Rights Watch, ‘No More Excuses: A Roadmap to Justice for CIA Torture’ (Human Rights Watch, 1 December 2015) <https://www.hrw.org/sites/default/files/report_pdf/us1215web.pdf> (Last accessed 15 May 2021), 27

⁴⁶ *ibid.* 27-28

United Nations Committee Against Torture.⁴⁷ Additionally, Sanders states of the lack of action resulting from the Holder review that ‘While reflecting a failure of political will, the cover of plausible legality helped facilitate this limited scope of recrimination.’⁴⁸

The move not to conduct prosecutions was, however, welcomed by some. For example, after the release of the Senate Intelligence Committee’s Report on the CIA Detention and Interrogation Program, Posner argued that ‘Obama has acted rightly by refusing to authorize prosecutions...Criminal punishment of a partisan opponent who engages in illegal behavior for policy rather than personal reasons can pose a risk to democracy.’⁴⁹ A more nuanced approach as to why prosecutions should not occur is put forward by Vladeck, who argues that:

“The problem isn’t that laws weren’t broken, or prosecutions might not succeed. The problem is that our real goal, as a polity, should be in hard-wiring into our historical and legal consciousness the conclusion that these actions must never be given legal sanction again. And the more that prosecutions are perceived across large swaths of American society as the “criminalization of politics”, whether rightly or wrongly, the less I suspect that historical narrative will be able to develop.”⁵⁰

Any position which does not indicate that criminal investigations or prosecutions have taken place is unlikely to be acceptable to the OTP, as otherwise it would seem unlikely that the conduct of US forces would have been included within the scope of any investigation into Afghanistan in the first place. This is even more prudent when it is considered that one of the objectives of the ICC, as stated in the preamble to the Rome Statute is to ‘guarantee lasting respect for

⁴⁷ United Nations Committee against Torture (n 6) para 12

⁴⁸ Rebecca Sanders, *Plausible Legality: Legal Culture and Political Imperative in the Global War on Terror* (Oxford University Press 2018), 69-70

⁴⁹ Eric Posner, ‘Why Obama Won’t Prosecute Torturers’ (Slate, 9 December 2014) <<https://slate.com/news-and-politics/2014/12/senate-torture-report-why-obama-wont-prosecute-cia-and-bush-administration-lawbreakers.html>> (Last accessed 15 May 2021)

⁵⁰ Steve Vladeck, ‘Why We Shouldn’t Prosecute the Torturers’ (Just Security, 11 December 2014) <<https://www.justsecurity.org/18288/prosecute-torturers/>> (Last accessed 15 May 2021)

and the enforcement of international justice',⁵¹ and the importance of the prohibition of war crimes. The importance of this prohibition is recognised, for example, in the foreword to the Department of Defense Law of War Manual which states that:

“The law of war is a part of our military heritage, and obeying it is the right thing to do. But we also know that the law of war poses no obstacle to fighting well and prevailing. Nations have developed the law of war to be fundamentally consistent with the military doctrines that are the basis for effective combat operations. For example, the self-control needed to refrain from violations of the law of war under the stresses of combat is the same good order and discipline necessary to operate cohesively and victoriously in battle. Similarly, the law of war’s prohibitions on torture and unnecessary destruction are consistent with the practical insight that such actions ultimately frustrate rather than accomplish the mission.”⁵²

Additionally, in relation to torture, the ICTY Trial Chamber stated in *Delalić* that ‘There can be no doubt that torture is prohibited by both conventional and customary international law.’⁵³ However, commentary suggests that a lack of action taken by the United States to address torture has caused damage to this prohibition. For example, Hajjar argued that ‘because of the power and influence of the United States... unaccountability undermines the strength of the anti-torture norm globally’;⁵⁴ Schmidt and Sikkink state that ‘US actions have damaged the torture norm’s robustness by injecting a greater degree of legal and cultural acceptance for the situational use of torture and by disregarding the obligation of accountability’;⁵⁵ and Sanders said that ‘considering ongoing impunity for torture, the anti-torture norm certainly has not been strengthened.

⁵¹ Rome Statute (n 1), Preamble

⁵² Department of Defense Law of War Manual (n 31) ii

⁵³ *Prosecutor v Delalić* (Judgement) IT-96-21-T (16 November 1998), para 452. See also: International Committee of the Red Cross, ‘Rule 90. Torture and Cruel, Inhuman or Degrading Treatment’ (International Humanitarian Law Database) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule90> (Last accessed 15 May 2021)

⁵⁴ Lisa Hajjar, ‘The afterlives of Torture: The Global Implications of Reactionary US Politics’, (2019) 8(2) *State Crime* 164, 172

⁵⁵ Averell Schmidt and Kathryn Sikkink, ‘Breaking the Ban: The Heterogenous Impact of US Contestation of the Torture Norm’, (2019) 4(1) *Journal of Global Security Studies* 105, 118

Rather it barely survived and remains vulnerable to assault.⁵⁶ There is therefore a justifiable need for the OTP to investigate crimes allegedly committed by US personnel since their alleged actions serve to undermine important rules of international law.

2. Good Faith Reliance on Legal Advice – 42 US Code s.2000dd-1

As was highlighted above, when launching a preliminary review into the conduct of US personnel, in August 2009, US Attorney General Eric Holder specifically stated that ‘the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal advice given by the Office of Legal Counsel regarding the interrogation of detainees’.⁵⁷ However, four years earlier as part of the Detainee Treatment Act 2005, a defence was enacted which may also serve to prevent prosecutions:

“In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent’s engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent 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.”⁵⁸

⁵⁶ Sanders (n 48) 158

⁵⁷ United States Department of Justice (n 40)

⁵⁸ 42 US Code s.2000dd-1

Section 8(b) of the Military Commissions Act 2006 clarifies the scope of this defence, stating:

“Section 1004 of the Detainee Treatment Act of 2004 (42 U.S.C. 2000dd-1) shall apply with respect to any criminal prosecution that-

- (1) relates to the detention and interrogation of aliens described in such section;
- (2) is grounded in section 2441(c)(3) of title 18, United States Code; and
- (3) relates to actions occurring between September 11, 2001, and December 30, 2005.”⁵⁹

Carson is critical of this defence, stating that ‘The message is undeniably clear: the machinery of the judiciary is not geared up to deter abusive interrogations’,⁶⁰ and that it ‘signals that the Administration will pound incidents of abuse with a velvet-tipped hammer’.⁶¹ Furthermore, Hobel is critical of the relationship between the defence found within the Detainee Treatment Act and the defence of superior orders, stating that ‘Interpreted broadly... the DTA defense echoes discredited versions of the superior orders defense that insufficiently deterred violations of international humanitarian law.’⁶²

Human rights groups have stated that the defence should have a limited effect. The American Civil Liberties Union (ACLU), for example, have stated that the defence ‘is not a golden shield’.⁶³ Additionally, Human Rights Watch have

⁵⁹ Military Commissions Act of 2006, Public Law 109-366 (17 October 2006), s.8(b). The statutory provision referred to in s.8(b)(2) refers to the offences of grave breaches of Common Article 3 of the Geneva Conventions found within the War Crimes Act, which was discussed in Chapter 2.

⁶⁰ Carlissa R Carson, ‘The Military Commissions Act of 2006: How Its Inability to Curb Abusive Interrogations Threatens the Future Treatment of Detainees and the United States’ Reputation’ (2008) 57 Emory Law Journal 695, 711

⁶¹ *ibid*

⁶² Mark WS Hobel, ‘So Vast an Area of Legal Irresponsibility – The Superior Orders Defense and Good Faith Reliance on Advice of Counsel’ (2011) 11 Columbia Law Review 574, 600.

⁶³ American Civil Liberties Union, ‘Why a Criminal Investigation is Necessary’ (American Civil Liberties Union) <<https://www.aclu.org/other/why-criminal-investigation-necessary?redirect=why-criminal-investigation-necessary>> (Last accessed 15 May 2021)

stated that ‘it was not reasonable to believe that these practices were lawful’,⁶⁴ that ‘reliance on counsel was not “in good faith”’,⁶⁵ and that there should be no defence for ‘those involved in authorizing the program. It also should not be available to those who engaged in practices that went beyond what where authorised’.⁶⁶ Sifton argues that ‘the defense may... be viewed skeptically in cases of outright torture’,⁶⁷ though it ‘could meet greater success in cases where the applicable law is unclear’.⁶⁸

3. The Use of Executive Clemency

The final issue to be discussed in this chapter is the potential use of executive clemency by the United States in order to address alleged crimes committed by US personnel. This was suggested by ACLU Executive Director Anthony Romero in December 2014 in the run-up to the release of the Senate Intelligence Committee’s Report on the CIA Detention and Interrogation Program.⁶⁹ Romero stated that:

“Mr. Obama is not inclined to pursue prosecutions – no matter how great the outrage, at home or abroad, over the disclosures – because of the political fallout. He should therefore take ownership of this decision. He should acknowledge that the country’s most senior officials authorized conduct that violated fundamental laws, and compromised our standing in the world as well as our security. If the choice is between a tacit pardon and a formal one, a formal one is better. An explicit pardon would lay down a marker, signalling to those considering torture in the future that they could be prosecuted.”⁷⁰

⁶⁴ Human Rights Watch (n 45) 95

⁶⁵ *ibid* 96

⁶⁶ *ibid*

⁶⁷ John Sifton, ‘United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps’ (2006) 43 *Harvard Journal on Legislation* 487, 509

⁶⁸ *ibid*

⁶⁹ Anthony D Romero, ‘Pardon Bush and Those Who Tortured’ (*New York Times*, 8 December 2014) <<https://www.nytimes.com/2014/12/09/opinion/pardon-bush-and-those-who-tortured.html>> (Last accessed 15 May 2021)

⁷⁰ *ibid*

This proposal was criticised by Heller on the basis that:

“there is a significant difference between lacking the political will to prosecute the Bush administration’s torturers and having the political will to offer them a blanket amnesty... Some states in the world can at least plausibly argue that amnestying the previous regime’s crimes is necessary to avoid political destabilisation and future conflict. But the US is not one of them.”⁷¹

Additionally, the Legal Director of the Center for Constitutional Rights, Baher Azmy, criticized the proposal of pardoning those responsible for torture, arguing that ‘The notion that torturers should be shielded from any consequences for their actions only makes sense in a society in which human rights and constitutional protections have been demoted’.⁷²

However, the rationale behind this criticism is only one reason why such a policy should not be seen in the interests of either the United States or the OTP, another can be seen in the critical response to the recent exercise of executive clemency for crimes committed in the context of an armed conflict. The recent use of clemency is not directly related to the offences the OTP is planning to investigate – some offences subject to clemency took place in Iraq, and those in Afghanistan do not appear to correspond to the conduct forming the basis of the OTP’s ongoing investigation.⁷³ It does, however, raise further questions about the extent to which the United States is committed to holding those who commit serious crimes accountable.

In May 2019, President Trump pardoned Michael Behenna, who had been convicted for the murder of an Iraqi detainee during the course of an

⁷¹ Kevin Jon Heller, ‘The ACLU Endorses Blanket Amnesty for Torture’ (Opinio Juris, 9 December 2014) <<http://opiniojuris.org/2014/12/09/aclu-endorses-blanket-amnesty-torture/>> (Last accessed 15 May 2021)

⁷² Baher Azmy, ‘To prevent torture, prosecute torture’ (MSNBC, 8 December 2014) <<https://www.msnbc.com/msnbc/cia-report-prevent-torture-prosecute-torture-msna474961>> (Last accessed 15 May 2021)

⁷³ The offences allegedly committed by the armed forces that form the basis of the OTP’s investigation request are listed in OTP Afghanistan Investigation Request (n 9) para 187

interrogation.⁷⁴ In November 2019, Trump took further action in relation to three individuals who had been charged with, or convicted of, crimes in the context of an armed conflict.⁷⁵ Matthew Golsteyn, who was awaiting trial for killing a suspected bomb maker in 2010,⁷⁶ was pardoned.⁷⁷ Edward Gallagher, who had been found not guilty of the murder of a captured teenage ISIS fighter but convicted of being photographed next to the ISIS member's body,⁷⁸ had a demotion reversed.⁷⁹ Additionally, Clint Lorance, who had been convicted of numerous offences including murder for incidents that occurred in Kandahar Province in Afghanistan in June-July 2012,⁸⁰ was also pardoned.⁸¹ Finally in December 2020, Trump pardoned four former Blackwater personnel who were responsible for the deaths of 17 Iraqi civilians in 2007.⁸²

Former senior security officials within the US have been critical of the actions of Trump, and the consequences that they could have on the military. Former National Security Member Jeff McCausland after the exercise of clemency in 2019 stated that:

“First, military commanders at all levels may be concerned about being second guessed for decisions they make about holding their troops

⁷⁴ Mihir Zaveri, 'Trump Pardons Ex-Army Soldier Convicted of Killing Iraqi Man' (*New York Times*, 6 May 2019) <<https://www.nytimes.com/2019/05/06/us/trump-pardon-michael-behenna.html>> (Last accessed 15 May 2021)

⁷⁵ Dave Philipps, 'Trump Clears Three Service Members in War Crimes Cases' (*New York Times*, 15 November 2019) <<https://www.nytimes.com/2019/11/15/us/trump-pardons.html>> (Last accessed 15 May 2021)

⁷⁶ Thomas Gibbons-Neff, 'Army Charges Special Forces Soldier in 2010 Killing of Afghan' (*New York Times*, 14 December 2018) <<https://www.nytimes.com/2018/12/14/us/politics/mathew-golsteyn-special-forces-murder-charges.html>> (Last accessed 15 May 2021)

⁷⁷ White House, 'Statement from the Press Secretary' (White House, 15 November 2019) <<https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-97/>> (Last accessed 15 May 2021)

⁷⁸ Dave Philipps, 'Navy SEAL Chief Accused of War Crimes Is Found Not Guilty of Murder' (*New York Times*, 2 July 2019) <<https://www.nytimes.com/2019/07/02/us/navy-seal-trial-verdict.html>> (Last accessed 15 May 2021)

⁷⁹ White House (n 77)

⁸⁰ Ernesto Londoño, 'Army officer convicted in shooting deaths of 2 Afghans' (*Washington Post*, 2 August 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> (Last accessed 20 March 2021)

⁸¹ White House (n 77)

⁸² Maggie Haberman and Michael S Schmidt, 'Trump Pardons Two Russia Inquiry Figures and Blackwater Guards' (*New York Times*, 22 December 2020) <<https://www.nytimes.com/2020/12/22/us/politics/trump-pardons.html>> (Last accessed 15 May 2021)

accountable for potential war crimes. In the future, they may even hesitate to do so. Second, some service members may be encouraged to believe that in all cases the ends justify the means. This may result in future violations of international law and further alienate those we are supposed to be supporting.”⁸³

Additionally, the former Commandant of the Marine Corps, Charles Krulak, stated that:

“Disregard for the law undermines our national security by reducing combat effectiveness, increasing the risks to our troops, hindering cooperation with allies, alienating populations whose support the United States needs in the struggle against terrorism, and providing a propaganda tool for extremists who wish to do us harm.”⁸⁴

The academic response to the Trump Administration’s use of clemency has also been critical. Solis, for example, stated that the Trump Administration’s actions had ‘subverted military justice’,⁸⁵ and ‘made it easier for those who have committed crimes to escape justice in the workings of the military justice system’.⁸⁶ Bell and Gift also argue that ‘Pardons, particularly for egregious crimes committed on the battlefield signal that norm enforcement within the military isn’t a priority’.⁸⁷ Additionally, it has been argued that the Trump

⁸³ Jeff McCausland, ‘Trump’s new pardons beg the question: Is the American military just a ‘killing machine’?’ (NBC News, 19 November 2019) <<https://www.nbcnews.com/think/opinion/trump-s-new-pardons-beg-question-american-military-just-killing-ncna1085651>> (Last accessed 15 May 2021)

⁸⁴ Human Rights First, ‘Gen. Krulak Statement on Trump’s Military Pardons’ (Human Rights First, 15 November 2019) <<https://www.humanrightsfirst.org/press-release/gen-krulak-statement-trumps-military-pardons>> (Last accessed 15 May 2021). See also the comments of the former Chairman of the Joint Chiefs of Staff, Martin Dempsey, ‘Tweet, dated 21 May 2019’ (Twitter, 21 May 2019) <https://twitter.com/Martin_Dempsey/status/1130809276191035392> (Last accessed 15 May 2021)

⁸⁵ National Public Radio, ‘Trump Pardons 2 Service Members in War Crimes Cases’ (NPR, 16 November 2019) <<https://www.npr.org/2019/11/16/780160297/trump-pardons-2-service-members-in-war-crimes-cases?t=1574277421341>> (Last accessed 15 May 2021)

⁸⁶ *ibid*

⁸⁷ Andrew M Bell and Thomas Gift, ‘War Crime Pardons and What They Mean for the Military’ (War on the Rocks, 5 December 2019) <<https://warontherocks.com/2019/12/war-crime-pardons-and-what-they-mean-for-the-military/>> (Last accessed 15 May 2021)

Administration's use of executive clemency could lead to the imposition of criminal liability under the principle of command responsibility.⁸⁸

Finally, it should also be noted that the use of clemency has been the subject of criticism by the Chair-Rapporteur of the United Nations Working Group on the use of mercenaries, Jelena Apparac, who said of the pardons of the former Blackwater personnel that:

“The Geneva Conventions oblige States to hold war criminals accountable for their crimes, even when they act as private security contractors. These pardons violate US obligations under international law and human rights at a global level.”⁸⁹

In light of this extensive criticism, it appears doubtful that the OTP or ICC would ever accept that the use of executive clemency would discharge US obligations under the principle of complementarity, when not only academics and the United Nations have been critical of the impact of such actions, but senior figures from the military have admitted that such actions undermine the notion that the United States is a supporter of international humanitarian law.

4. Conclusion

In their decision on whether to authorise an investigation, the Pre-Trial Chamber stated that ‘the potential cases arising from the incidents presented by the Prosecution appear to be admissible.’⁹⁰ The analysis conducted in this Chapter does not serve to rebut this conclusion. Rather, it raises questions about

⁸⁸ Gabor Rona, ‘Can a Pardon Be a War Crime?: When Pardons Themselves Violate the Laws of War’ (Just Security, 24 December 2020) <<https://www.justsecurity.org/64288/can-a-pardon-be-a-war-crime-when-pardons-themselves-violate-the-laws-of-war/>> (Last accessed 15 May 2021); Stuart Ford, ‘Has President Trump Committed a War Crime by Pardoning War Criminals?’ (2020) 35 American University International Law Review 757, 788-89

⁸⁹ Office of the High Commissioner for Human Rights, ‘US pardons for Blackwater guards an “affront to justice” – UN experts’ (Office of the High Commissioner for Human Rights, 30 December 2020) <<https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26633&LangID=E>> (Last accessed 15 May 2021)

⁹⁰ Afghanistan Pre-Trial Investigation Decision (n 32) para 79

whether the United States could ever satisfy the principle of complementarity, and indeed raises questions about the extent to which the US is committed to compliance with international humanitarian law. The analysis conducted shows that accountability processes within the United States are either inadequate or lacking entirely. There are multiple policies which prevent individuals responsible for serious crimes from being held criminally accountable. Even in relation to the use of executive clemency of US military personnel by the Trump Administration, military figures were against it, citing the fact that it runs contrary to international law. This is problematic, since, as has also been shown in this chapter, the United States acknowledges the importance of international humanitarian law and the prohibitions it imposes.

Part Three

Chapter Five: Criminal Law in the United Kingdom

This Chapter, the first of four discussing the United Kingdom's handling of allegations of detainee abuse in Iraq, will assess crimes under English law which deal with conduct relating to the war crimes which the Office of the Prosecutor (OTP) has determined there is a 'reasonable basis to believe' were committed by members of the United Kingdom military.¹ The OTP stated:

“on the basis of the information available, there is a reasonable basis to believe that, at a minimum, the following war crimes have been committed by members of UK armed forces: wilful killing/murder under article 8(2)(a)(i) or article 8(2)(c)(i); torture and inhuman/cruel treatment under article 8(2)(a)(ii) or article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(b)(xxi) or article 8(2)(c)(ii); rape and/or other forms of sexual violence under article 8(2)(b)(xxii) or article 8(2)(e)(vi).”²

In their 2019 Preliminary Examination Report, the OTP stated that their focus in their preliminary examination of UK conduct in Iraq has been on assessing the genuineness of UK investigation efforts, rather than on inability to conduct an investigation.³ This means that this Chapter's discussion of UK criminal law will not focus on every single potential offence which could have been committed by UK personnel in relation to the allegations currently subject to examination by the OTP.

Instead, this Chapter will discuss only offences related to the 'strategic priorities' of the Iraq Historic Allegations Team, as stated in their quarterly updates.⁴

¹ Office of the Prosecutor, 'Situation in Iraq/UK: Final Report' (Office of the Prosecutor, 9 December 2020) <<https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>> (Last accessed 15 May 2021), para 71

² *ibid*

³ Office of the Prosecutor, 'Report on Preliminary Examination Activities 2019' (International Criminal Court, 5 December 2019) <<https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>> (Last accessed 15 May 2021), paras 167-68

⁴ Iraq Historic Allegations Team, 'IHAT Quarterly Update – April to June 2017' (Iraq Historic Allegations Team, 27 July 2017)

These priorities state that the focus of IHAT's investigatory efforts surrounded 'allegations of unlawful killing',⁵ 'allegations of serious ill treatment including rape, sexual assaults and Grievous Bodily Harm',⁶ and 'allegations of ill treatment where the war-crime threshold has been met'.⁷ This Chapter will therefore discuss crimes under the International Criminal Court Act 2001 and the Geneva Conventions Act 1957, torture under s.134 of the Criminal Justice Act 1988, grievous bodily harm (GBH) under the sections 18 and 20 of the Offences against the Person Act 1861, and the homicide offences of murder and manslaughter found under common law.

In the time period in which UK personnel are alleged to have committed the offences which form the basis of the OTP's preliminary examination, 20 March 2003 – 28 July 2009,⁸ the primary means by which the offences outlined above could be prosecuted in the military context would be as a 'civil offence' under s.70 of the Army Act 1955 in the case of army personnel,⁹ s.70 of the Air Force Act 1955 in the case of air force personnel,¹⁰ or s.42 of the Naval Discipline Act 1957 in the case of navy personnel.¹¹ This is the case because alleged conduct

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644256/20170809-Quarterly_Update_website_Jun17_1_.pdf> (Last accessed 15 May 2021), 2. IHAT Quarterly Updates covering the period up until December 2015 included a further 'strategic priority', 'allegations of ill-treatment not meeting war crimes threshold' though it is not stated what this means: Iraq Historic Allegations Team, 'Iraq Historic Allegations Team (IHAT) Quarterly Update – October to December 2015' (Iraq Historic Allegations Team, 19 February 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504671/20160222-Quarterly_Update_website.pdf> (Last accessed 15 May 2021), 2.

Additionally, in the first Quarterly Report in which this additional priority was not included, it is not stated why the priority was no longer included: Iraq Historic Allegations Team, 'IHAT Quarterly Update – January to March 2016' (Iraq Historic Allegations Team, 6 May 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525351/20160518-Quarterly_Update_website_Final_2_.pdf> (Last accessed 15 May 2021)

⁵ 'IHAT Quarterly Update April-June 2017' (n 4) 2

⁶ *ibid*

⁷ *ibid*. The investigative focus of IHAT and its successor organisation, the Service Police Legacy Investigations (SPLI) has been subject to criticism by Stubbins Bates who states that the approach of the MoD means 'ill-treatment is understood in terms of the English criminal law of assault, rather than international law; and hints at a novel proportionality requirement before allegations of mistreatment in British military custody might be investigated.'. Elizabeth Stubbins Bates, 'Distorted Terminology: The UK's Closure of Investigations into Alleged Torture and Inhuman Treatment in Iraq' (2019) 68 *International and Comparative Law Quarterly* 719, 720.

⁸ Office of the Prosecutor (n 1) para 72

⁹ Army Act 1955, s.70

¹⁰ Air Force Act 1955, s.70

¹¹ Naval Discipline Act 1955, s.42

occurred prior to the Armed Forces Act 2006, which resulted in significant reform to the military justice system, coming into force on 31 October 2009.¹²

s.70(2) of the Army Act 1955 states that ‘the expression “civil offence” means any act or omission punishable by the law of England or which, if committed in England, would be punishable by that law’.¹³ In *Cox v Army Council*, it was confirmed that this would be the case to the extent that it is possible to commit offences under English law overseas.¹⁴

1. International Criminal Court Act 2001

As is stated in the explanatory notes to the International Criminal Court Act 2001 (ICC Act 2001), prepared by the Foreign Office, one of the ‘principal aims’ of the Act is ‘to incorporate the offences in the Statute into domestic law so that domestic authorities will always be in a position to investigate and prosecute any ICC crimes committed in this country, or committed overseas by a UK national, a UK resident or a person subject to UK Service jurisdiction’.¹⁵ To this end, s.50(1) of the Act confirms that the definitions of the crimes of genocide, crimes against humanity and war crimes have the same definition under the Act as they do in the Rome Statute,¹⁶ and s.51 of the Act makes it an offence to commit these crimes under English and Welsh law.¹⁷ Whilst this may appear to ensure that the UK could easily comply with the principle of complementarity if it chose to do so, by charging individuals suspected of international crimes with such crimes, there are a number of issues which may potentially make the application of the Rome Statute in a domestic setting more difficult.

¹² For an explanation, see Ministry of Defence, *Manual of Service Law* (JSP 830 Version 2.0), 1-8-2

¹³ Army Act 1955, s 70(2). s.70(2) of the Air Force Act 1955 contains the same definition of a civil offence; and s.42(1) of the Naval Discipline Act 1957 contains a definition which carries the same effect, though is slightly differently worded, stating that a civil offence is ‘any act or omission which is punishable by the law of England or would be so punishable if committed in England’.

¹⁴ *Cox v Army Council* [1963] AC 48

¹⁵ Explanatory Notes to the International Criminal Court Act 2001, para 6

¹⁶ International Criminal Court Act 2001, s.50(1); Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Articles 6-8.

¹⁷ International Criminal Court Act 2001, s.51

When making decisions in relation to offences under the ICC Act 2001, courts are required to 'take into account' the ICC's Elements of Crimes,¹⁸ as well as the jurisprudence of the ICC,¹⁹ and that 'account may also be taken of any other relevant international jurisprudence'.²⁰ In relation to this final category, the explanatory notes to the Act state that the term 'relevant international jurisprudence' refers to 'any relevant jurisprudence of the International Criminal Tribunals and the International Court of Justice'.²¹ These requirements are criticised by Grady based on a number of factors including the potential for judges in UK courts not having a full understanding of international criminal law,²² the differences in structure between domestic court judgments and international tribunal judgments,²³ and because of the potential for conflict between the position of the UK and the ICC regarding the interpretation of crimes under the Rome Statute.²⁴

The ICC Act 2001 also incorporates the principle of command responsibility into English law in s.65 of the Act. The explanatory notes to the Act state that 'inclusion of command responsibility... is intended to permit the investigation and prosecution of cases before domestic courts in all the circumstances where the ICC might found a case on that basis'.²⁵ May and Powles state that the inclusion of 'indirect command responsibility and the liability of superiors pursuant to section 65 of the ICC Act 2001 does represent a new basis of criminal liability and goes well beyond existing forms of liability in English law'.²⁶

¹⁸ *ibid* s.50(2)

¹⁹ *ibid* s.50(5)

²⁰ *ibid*

²¹ Explanatory Notes to the International Criminal Court Act 2001, para 89

²² Kate Grady, 'International Crimes in the courts of England and Wales' [2014] *Criminal Law Review* 693, 701

²³ *ibid*

²⁴ *ibid*

²⁵ Explanatory Notes to the International Criminal Court Act 2001, para 104

²⁶ Richard May and Steven Powles, 'Command responsibility – a new basis of criminal liability in English law?' [2002] *Criminal Law Review* 363, 377. Shackle states that 'the last person in Britain to be prosecuted for crimes committed by forces under their command was in 1651 during the civil war': Samira Shackle, 'Why we may never know if British troops committed war crimes in Iraq' (*The Guardian*, 7 June 2018)

<<https://www.theguardian.com/news/2018/jun/07/british-troops-war-crimes-iraq-historic-allegations-team>> (Last accessed 15 May 2021)

The principle of command responsibility is undoubtedly important in relation to the Preliminary Examination into the conduct of UK personnel in Iraq, since the European Center for Constitutional and Human Rights (ECCHR) and Public Interest Lawyers (PIL) alleged in their joint communication to the OTP that criminal liability for abuses in Iraq potentially stretched as far as senior military personnel, the Minister for Service Personnel and the Secretary of State for Defence.²⁷ Additionally, in their Final Report on the UK Preliminary Examination, the OTP noted that command responsibility had been a focus for UK investigators.²⁸ However, the application of the principle has yet to be fully tested in UK courts. For example, Rasiah states in connection to the prosecution of Major Peebles, Staff Sergeant Davies and Colonel Mendonca in relation to the death of Baha Mousa that:

“The prosecution did not deploy enterprise liability or superior responsibility... opting rather to characterise the alleged conduct as negligently performing a duty – a general, less serious offence centring on the failure to adhere to the standards of a reasonable person in performing any military duty.”²⁹

This is the case even though Rasiah went on to state that Payne’s court-martial highlighted that it would have been easier to secure the conviction of Payne’s superiors on the basis of command responsibility than it was to prove the charges that were actually pursued.³⁰ This is problematic since the case of Donald Payne remains the only instance in which there has been a conviction

²⁷ European Center for Constitutional and Human Rights and Public Interest Lawyers, ‘Communication to the Office of the Prosecutor of the International Criminal Court: The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008’ (European Center for Constitutional and Human Rights, 10 January 2014) <https://www.ecchr.eu/fileadmin/Juristische_Dokumente/January_2014_Communication_by_ECCHR_and_PIL_to_ICC_OTP_re_Iraq_UK_public_version_.pdf> (Last accessed 15 May 2021), 185-87

²⁸ Office of the Prosecutor (n 1) para 191

²⁹ Nathan Rasiah, ‘The Court-martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice’ (2009) 7 *Journal of International Criminal Justice* 177, 191. For a discussion of the charges against Peebles, Davies and Mendonca, see 182-84 and 191-93

³⁰ *ibid* 192

under the ICC Act 2001.³¹ Information disclosed by the Ministry of Defence also confirms that there has only been 1 prosecution under the ICC Act 2001 in relation to the armed conflict in Iraq.³² If the ECCHR's assertions were correct, and liability for alleged war crimes did stretch as far as senior military personnel and government ministers, the application of command responsibility is a subject which would receive much scrutiny should the UK decide to pursue further prosecutions under this legislation.

The final point to discuss in this section is the potential application of defences in cases involving crimes under the Rome Statute which may either not exist in UK law or are not compatible with the reasoning behind the current application of defences in UK law. As Cryer and Bekou state, s.56 of the ICC Act 2001 enables defences found within English law to apply to offences under the Rome Statute.³³ However, they also point out that under Article 31(d) of the Rome Statute, duress is a defence to crimes under the Rome Statute, even though in UK law, the defence would not be available in cases involving murder.³⁴ Cryer states that the defence of duress would not apply to ICC Act 2001 crimes involving murder because of the decision of the House of Lords in *Howe*.³⁵ It is, however, unclear whether the defence of duress should apply to any crimes under the Rome Statute in UK law in any event. For example, in *Howe*, Lord Griffiths stated:

“We face a rising tide of violence and terrorism against which the law must stand firm recognising that its highest duty is to protect the freedom and lives of those that live under it. The sanctity of human life lies at the

³¹ Carla Ferstman, Thomas Obel Hansen and Noora Arajärvi, 'The UK Military in Iraq: Efforts and Prospect for Accountability for International Crimes Allegations?' (1 October 2018) <https://www1.essex.ac.uk/hrc/documents/THE_UK_MILITARY_IN_IRAQ_1Oct2018.pdf> (Last accessed 15 May 2021), 14

³² Ministry of Defence, 'Letter, dated 3 November 2020, to Roseanne Burke, CEASEFIRE', available at <https://www.ceasefire.org/wp-content/uploads/2020/12/FOI2020_06821-Response-V2.pdf> (Last accessed 15 May 2021)

³³ Robert Cryer and Olympia Bekou, 'International Crimes and ICC Cooperation in England and Wales', (2007) 5 *Journal of International Criminal Justice* 441, 447

³⁴ *ibid*; Rome Statute (n 16) Article 31(d)

³⁵ *R v Howe* [1987] 1 AC 417; Robert Cryer, 'Implementation of the International Criminal Court Statute in England and Wales' (2002) 51(3) *International and Comparative Law Quarterly* 733, 740

root of this ideal and I would do nothing to undermine it, be it ever so slight.”³⁶

If the protection of human life and freedom really is a major factor in deciding whether a defence such as duress should apply under UK law, it is questionable whether crimes under the Rome Statute should ever be included within the defence since the preamble to the Rome Statute states that the crimes included within the statute are ‘the most serious crimes of concern to the international community as a whole’,³⁷ and ‘shock the conscience of humanity’.³⁸ Additionally, in relation to some of the offences which constitute a war crime under Article 8 of the Rome Statute,³⁹ it is clear that there is no justification for these acts being committed. For example, in relation to torture, Article 2(2) of the Torture Convention states, ‘No exceptional circumstances whatsoever, whether a state of war, internal political instability or any other public emergency, may be invoked as a justification of torture’.⁴⁰

Whilst Cryer and Bekou state that the majority of the defences available under UK law are similar to those found within the Rome Statute,⁴¹ there is the potential for defences other than duress to apply differently in UK law than would be the case at the ICC. For example, Grady states that the version of self-defence available under the Rome Statute is ‘wider’ than would be the case under English law.⁴² Additionally, both Grady and Cryer and Bekou raise the fact that UK courts have not yet addressed the potential availability of a defence of superior orders, even though such a defence exists in the Rome Statute.⁴³ Ultimately, whether there are any problems regarding the application of defences to crimes under the Rome Statute in UK courts is a matter which will

³⁶ *Howe* (n 35) 443-44

³⁷ Rome Statute (n 16) Preamble

³⁸ *ibid*

³⁹ *ibid* Article 8

⁴⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, Article 2(2). Article 2(3) also states that ‘an order from a superior officer or a public authority may not be invoked as a justification for torture’.

⁴¹ Cryer and Bekou (n 33) 447

⁴² Grady (n 22) 703

⁴³ *ibid*; Cryer and Bekou (n 33) 447

be determined as case law on the point develops. However, as was mentioned in relation to the potential application of the principle of command responsibility, the number of prosecutions under the ICC Act 2001 have to this point been limited.

2. Geneva Conventions Act 1957

The Geneva Conventions Act 1957, as implemented during the time period when the offences which are the focus of the OTP's Preliminary Examination are alleged to have taken place, criminalises grave breaches of the Four Geneva Conventions,⁴⁴ and grave breaches of Additional Protocol I.⁴⁵ The Act does not, however, criminalise breaches of Common Article 3 to the Geneva Conventions which governs non-international armed conflicts.⁴⁶ This means that the Act would only apply during the time when the conflict in Iraq was classified as an international armed conflict, which the OTP state was the case between '20 March 2003 and 28 June 2004'.⁴⁷ Additionally, as revealed by the Ministry of Defence, no prosecutions have been brought under this act for crimes related to the armed conflict in Iraq.⁴⁸ It is therefore impracticable to discuss the Act any further, since it is not clear how the UK courts would interpret the Geneva Conventions in a criminal context.

⁴⁴ Geneva Conventions Act 1957, ss.1(1) and 1(1A)(a); Geneva Convention For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted August 12 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I), Article 50; Geneva Convention For the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II), Article 51; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III), Article 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV), Article 147

⁴⁵ Geneva Conventions Act 1957, ss.1(1) and 1(1A)(b); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, Articles 11(4) and 85(2)-(4)

⁴⁶ Geneva Conventions (n 44) Common Article 3

⁴⁷ Office of the Prosecutor (n 1) para 74

⁴⁸ Ministry of Defence (n 32)

3. Torture as Found under s.134 of the Criminal Justice Act 1988

Under s.134 of the Criminal Justice Act 1988, torture is defined as the following:

- “(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.
- (2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if –
- (a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence –
 - (i) of a public official; or
 - (ii) of a person acting in an official capacity; and
 - (b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.”⁴⁹

The term ‘person acting in an official capacity’ was defined by the UK Supreme Court in *R v Reeves Taylor* as:

“a person who purports to act, otherwise than in a private and individual capacity, for or on behalf of an organisation or body which exercises, in the territory controlled by that organisation or body and in which the relevant conduct occurs, functions normally exercised by governments over their civilian populations. Furthermore, it covers any such person whether acting in peace time or in a situation of armed conflict.”⁵⁰

⁴⁹ Criminal Justice Act 1988, ss.134(1)-(2)

⁵⁰ *R v Reeves Taylor* [2019] UKSC 51, para 76

A defence to torture exists under s.134(4) of the Act where the defendant can 'prove that he had lawful authority, justification or excuse for that conduct'.⁵¹ The term 'lawful authority, justification or excuse' is then defined in s.134(5) of the Act.⁵² This defence has been subject to criticism by the United Nations Committee against Torture who state that such a defence 'is inconsistent with the absolute prohibition of torture'.⁵³ The extent to which the offence of torture under s.134 of the Criminal Justice Act is relevant to any prosecution of offences in relation to the armed conflict in Iraq has so far been non-existent, as the MoD state that no prosecutions have been brought under this legislation.⁵⁴ Additionally, the Supreme Court stated in *Reeves Taylor* that only 3 prosecutions had been brought for torture under this provision since it came into force.⁵⁵

4. Homicide Offences

This section will discuss the law related to the offences of murder and unlawful and dangerous act manslaughter as they apply to allegations of misconduct by UK military personnel in Iraq. As referred to previously, the investigation of unlawful killings was a priority for IHAT. Before this discussion begins, however, it is worth noting that in the course of the Iraq Historic Allegations Team's investigation into allegations alleged misconduct by UK personnel in Iraq, 325 cases involving 'unlawful killing/manlaughter' were referred, of which 20 were still under investigation at the time that IHAT was closed down in June 2017.⁵⁶ The amount of allegations which were ultimately dismissed may serve to demonstrate the difficulties of proving that a criminal offence has been committed in the context of an ongoing armed conflict, even where deaths have occurred. For example, IHAT's Table of work highlights a number of cases which were closed without prosecutions being brought as a result of there being

⁵¹ Criminal Justice Act 1988 s.134(4)

⁵² *ibid* s.134(5)

⁵³ United Nations Committee against Torture, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland' (7 June 2019) UN Doc CAT/C/GBR/CO/6, para 12

⁵⁴ Ministry of Defence (n 32)

⁵⁵ *Reeves Taylor* (n 50) para 62. The Court also noted in para 20 why the prosecution of Taylor could not occur under the International Criminal Court Act 2001.

⁵⁶ 'IHAT Quarterly Update – April to June 2017' (n 4) 2

insufficient evidence.⁵⁷ Additionally, of the prosecutions brought about so far in relation to the armed conflict in Iraq, none have resulted in a conviction for a homicide offence.⁵⁸

a. Murder

The definition of murder in English law was articulated in 1644 by Sir Edward Coke, who stated:

“Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature *in rerum natura* under the king’s peace, with malice aforethought, either expressed by the party or implied by law, so as the party wounded, or hurt, etc die of the wound or hurt, etc within a year and a day after the same.”⁵⁹

This definition of murder, despite being over three hundred years old, still applies to this day, subject to one major amendment – there is no longer a requirement that the victim die within a year and a day of whatever conduct it is that caused their death, due to the implementation of the Law Reform (Year and a Day Rule) Act 1996. In relation to the principle of the Queen’s Peace, it is clear that this does not serve to prevent a soldier from being held responsible for a prosecution that took place overseas. This can be demonstrated by the case of *Page* where a British soldier was found guilty of the murder as a result of a killing which occurred in an Egyptian village.⁶⁰ Additionally, Rowe illustrates that whilst a soldier would not be charged with murder in the context of military

⁵⁷ Iraq Historic Allegations Team, ‘Table of work completed (updated October 2017)’ (Iraq Historic Allegations Team, October 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649525/20171003-IHAT_NEW_master_copy_website_work_completed_table-HQComms_O.pdf> (Last accessed 15 May 2021) see 7-19

⁵⁸ Ferstman, Hansen and Arajärvi (n 31) 12-14; Rachel Kerr, ‘The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice’ in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examination: Volume I* (2018, Torkel Opsahl Academic EPublisher 2018) 487-88

⁵⁹ Sir Edward Coke, *The Third Part of the Institute of the Laws of England* (Printed by M. Flesher, for W. Lee, and D. Pakeman, 1644), 47

⁶⁰ *R v Page* [1954] 1 QB 170

operations which take place during an armed conflict or when defending themselves from attack, this does not serve to prevent a soldier from being charged with murder in instances involving detainee abuse.⁶¹

In *Moloney*, it was held that the term malice aforethought refers to an intention to kill or to cause grievous bodily harm.⁶² In *DPP v Smith*, it was held that the term grievous bodily harm refers to harm ‘no more and no less than “really serious”’.⁶³ It seems unlikely, in all but the most extreme of cases, that any member of the British military would directly intend to cause serious harm to Iraqi nationals.⁶⁴ As an alternative to finding that there is a direct intent to kill or cause GBH, it may be possible for board members or a jury to find that individuals involved in the deaths of detainees were aware that death or GBH to victims was virtually certain, a situation in which intention can be found, as held in *Woollin*.⁶⁵

It may be possible to find intent on the basis that some of the deaths which occurred in situations where there was potential wrongdoing occurred in situations that are similar. For example, a November 2019 joint report by *The Sunday Times* and the BBC’s *Panorama* program highlights that in May 2003 Radhi Nama died within two hours of being transported to Camp Stephen after he was punched in the face when being arrested and being placed in an area at Camp Stephen where he was subjected to stress positions.⁶⁶ The British military claimed that Nama had died as a result of a heart attack,⁶⁷ though an IHAT investigator stated:

⁶¹ Peter Rowe, ‘The criminal liability of a British soldier merely for participating in the Iraq war 2003: a response to Chilcot evidence’ [2010] *Criminal Law Review* 752, 755

⁶² *R v Moloney* [1985] 1 AC 905

⁶³ *DPP v Smith* [1961] AC 290, 334

⁶⁴ This may be demonstrated by *Evans*, where seven soldiers were tried for murder of Nadhem Abdullah on the basis of joint enterprise. The case was dismissed as a result of the judge not being able to determine the existence of a plan to kill or cause grievous bodily harm: *R v Evans and Others* (Decision Following Submissions of No Case to Answer) 3 November 2005 <<https://www.asser.nl/upload/documents/20120412T015138-Evans%20et%20al%20-%20Decision%20of%20No%20Case%20to%20Answer%20-%2003-11-2005%20-.pdf>> (Last accessed 15 May 2021), paras 22-24

⁶⁵ *R v Woollin* [1999] 1 AC 82, 96

⁶⁶ Insight, ‘Revealed: the evidence of war crimes ministers tried to bury’ (*The Sunday Times*, 17 November 2019) <<https://www.thetimes.co.uk/past-six-days/2019-11-17/news/revealed-the-evidence-of-war-crimes-ministers-tried-to-bury-6x2fb63ts>> (Last accessed 15 May 2021)

⁶⁷ *ibid*

“There are injuries all over his face, his face was filthy, full of dirt. He had marks on his forehead, he had marks around his eyes, down the side of his face. If a guy’s just fallen over and died of a heart attack, how would you have facial injuries?”⁶⁸

Five days later, another detainee, Abdul Jabar Mousa Ali, was wrongly captured by the British military, a process which allegedly involved being hit with weapons and kicked by British soldiers, before then being placed in stress positions at Camp Stephen and died hours after arriving at Camp Stephen.⁶⁹

However, even acknowledging these similarities, it appears unlikely that this could be used to find the required intent for murder, as the individuals involved in the deaths would have to either be the same or would have to be aware of the exact circumstances in which an individual died in order to be aware that the consequences of their actions were virtually certain. There is no evidence that either was the case. The SPLI ultimately decided not to prosecute in either case due to ‘insufficient evidence’.⁷⁰

Additionally, it may be difficult to prove that the conduct of an individual was actually responsible for causing the death of the victim. For example, in relation to the attempted prosecution of Donald Payne for manslaughter for the death of Baha Mousa, Rasiyah states that the Judge Advocate held that the prosecution failed to discharge their burden to prove that Payne was responsible for the injuries that ultimately caused Baha Mousa’s death, and that in any event, the chain of causation was broken when Payne had to use force to restrain Baha Mousa during an escape attempt.⁷¹ The Baha Mousa Report does, however, cast doubt on these findings by expressing that Baha Mousa removing his restraints and hood did not constitute an attempt to escape,⁷² and states that it

⁶⁸ *ibid*

⁶⁹ *ibid*

⁷⁰ Office of the Prosecutor (n 1) para 389

⁷¹ Rasiyah (n 29) 184

⁷² Sir William Gage, *The Report of the Baha Mousa Inquiry: Volume I* (2011-12, HC 1452-I), para 2.1032

was ‘hardly surprising’ that Baha Mousa would remove his restraints in order to defend himself.⁷³

Furthermore, in the Baha Mousa Inquiry, it was stated that it was not possible to prove who all the individuals involved in violence towards detainees during the course of an incident referred to as a ‘Free for All’ prior to the death of Baha Mousa, in which the detainees captured in Operation Salerno were subjected to excessive force by members of 1 Queen’s Lancashire Regiment:⁷⁴

“I do not accept that those who have admitted some violence during this incident, namely Payne, Pte Cooper, MacKenzie and Aspinall, were the only perpetrators of violence against the Detainees at this time. It is nevertheless not possible to determine with certainty the identity of those others who punched or kicked the Detainees.”⁷⁵

From this perspective, it is unclear whether it would be possible to secure any conviction in the context of a situation in which those responsible for an alleged offence cannot be identified. This is also highlighted by the finding of Judge Advocate General Blackett in *Evans* that there was not enough evidence on which to determine whether any of the defendants involved in the case were involved in the death of Nadhem Abdullah and it could not be proven that one of the defendants was even at the scene of the alleged crime.⁷⁶

b. Unlawful Act Manslaughter

Whilst the previous paragraphs show that it would be difficult to establish that a defendant had the prerequisite level of intent required in order to be convicted of murder, that does not mean they cannot be held responsible for an incident

⁷³ *ibid* para 2.1031

⁷⁴ For a discussion of the ‘Free For All’, see *ibid* Part Two Chapter 10.

⁷⁵ Sir William Gage, *The Report of the Baha Mousa Inquiry: Volume III* (2011-12, HC 1452-III), Summary of Findings para 62

⁷⁶ Owen Bowcott and Richard Norton-Taylor, ‘Paratroopers cleared of murdering Iraqi after judge says there is no case to answer’ (*The Guardian*, 4 November 2005) <<https://www.theguardian.com/uk/2005/nov/04/military.iraq>> (Last accessed 15 May 2021); *Evans* (n 64) para 26

which results in death since they could be prosecuted for manslaughter. The following paragraphs will discuss one form of manslaughter, that resulting from an unlawful act.

As demonstrated by *Attorney-General's Reference (No. 3 of 1994)*, in order to prove the offence of manslaughter, it must be shown that the defendant committed an unlawful act, deliberately, in a manner which was dangerous, and which resulted in the death of another human being.⁷⁷ The first element, the requirement of an unlawful act simply requires that the defendant has committed an act which would be a crime even in circumstances where it did not result in death. For example, in *Lamb* - a case involving children playing with a revolver which they did not believe would fire a bullet, but when fired, resulted in the death of the victim - it was held that unlawful and dangerous act manslaughter could not have occurred because the *actus reus* and *mens rea* for the underlying offence of assault did not exist.⁷⁸

The second element, that the act committed must be deliberate means that the underlying criminal act, in order to be unlawful act manslaughter, must not be one which can only be committed through the negligence of the defendant, as held in *Andrews v DPP*.⁷⁹ The third element, that the act must be dangerous, which, as held in *Church*, requires that 'the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm'.⁸⁰ The final element, requires that the death be a result of the unlawful and dangerous act, meaning that it must be proven that there is no break in the chain of causation, as demonstrated in *Lewis*.⁸¹

In relation to alleged conduct which took place in the context of the armed conflict in Iraq, it may be possible to obtain convictions in cases similar to those

⁷⁷ *Attorney-General's Reference (No. 3 of 1994)* [1996] QB 581, 591

⁷⁸ *R v Lamb* [1967] 2 QB 981

⁷⁹ *Andrews v DPP* [1937] AC 576

⁸⁰ *R v Church* [1966] 1 QB 59, 70. It was reaffirmed in *R v Newbury* [1977] AC 500, 507 that the test in determining whether an act is an objective one based on the realisation of 'all sober and reasonable people'.

⁸¹ *R v Lewis* [2010] EWCA Crim 151

of Radhi Nama and Abdul Jabar Mousa Ali discussed during the discussion of murder where the defendants were allegedly beaten by British soldiers, since a conviction for unlawful act manslaughter can be established in cases where a battery is the underlying criminal act.⁸² However, as was the case with murder, this requires that it is possible to prove that there is an unbroken chain of causation between the actions of individual defendants and the death of the victim, something which was held not to exist in the prosecution of Donald Payne.⁸³

Furthermore, it must be noted that not all deaths which occur in the context of an armed conflict are the result of criminal conduct. The OTP, for example state in their final report that:

“With respect to the alleged crime of wilful killing/murder under articles 8(2)(a)(i) and 8(2)(c)(i), concerning escalation-of-force and cross-fire incidents, the newly available information does not indicate that civilian deaths or injuries caused in these incidents resulted in intentional or reckless killing. Instead, the available information suggests that the deaths were caused by combat operations carried out in compliance with the law of armed conflict.”⁸⁴

It should be also noted that it has been alleged that situations which have involved the deaths of Iraqi civilians which should result in prosecutions being pursued have not been subject to such action. *The Sunday Times* and *Panorama* reported that an Iraqi police officer was allegedly shot dead by a British soldier without a warning being shouted out,⁸⁵ and no prosecution was brought forward despite IHAT investigators recommending that a prosecution should occur.⁸⁶ This raises concerns about the extent to which it is possible to

⁸² *R v Williams* [1992] 1 WLR 380, 388

⁸³ *Rasiah* (n 29) 184

⁸⁴ Office of the Prosecutor (n 1) para 112

⁸⁵ Insight, ‘British Army major ‘faked witness testimony to cover up killing of Iraqi policeman’ (*The Sunday Times*, 17 November 2019) <<https://www.thetimes.co.uk/past-six-days/2019-11-17/news/british-army-major-faked-witness-testimony-to-cover-up-killing-of-iraqi-policeman-mczl8dpg5>> (Last accessed 15 May 2021)

⁸⁶ *ibid*

state that the UK is conducting a genuine investigation into war crimes. However, it is stated in the OTP's final report into the UK Preliminary Examination that SPLI chose not to prosecute in this case because of an inability to reconcile conflicting evidence from witnesses and a lack of any further evidence.⁸⁷ The OTP stated that they 'treated the allegations of cover-up from former personnel of IHAT with the utmost seriousness',⁸⁸ though conclude that 'the Office has not been able to substantiate the allegations to the required level of proof before the Court to demonstrate an intent to shield perpetrators from criminal justice.'⁸⁹

5. Grievous Bodily Harm

Under English law, there are two versions of the offence of grievous bodily harm (GBH). Both offences are found within the Offences Against the Person Act 1861, maliciously inflicting grievous bodily harm under section s.20, and grievous bodily harm with intent to do grievous bodily harm under s.18.⁹⁰ A focus on GBH by IHAT has been criticised by Bates who states:

"Setting a threshold of grievous bodily harm as the minimum injury that might warrant investigation risks a failure to investigate an indeterminate number of torture cases; of grave breaches of the Four Geneva Conventions and Additional Protocol I, and could have the effect (but not yet the proven purpose) of shielding those responsible from prosecution for war crimes."⁹¹

⁸⁷ Office of the Prosecutor (n 1) para 395

⁸⁸ *ibid* para 407

⁸⁹ *ibid* para 412

⁹⁰ Sections 18 and 20 also contain the offence of wounding, which has the same mental elements as the version of GBH under the respective sections. The difference, however, is that the *actus reus* of wounding, as held by Goff LJ in *C (A Minor) v Eisenhower* [1984] QB 331 at 340, requires that 'there must be a break in the continuity of the skin. It must be a break in the continuity of the whole skin, but the skin may include not merely the outer skin of the body but the skin of an internal cavity of the body where the skin of the cavity is continuous with the outer skin of the body'.

⁹¹ Bates (n 7) 739

If this is the case, the UK's investigative policies raise questions about the extent to which the UK is willing to investigate accusations of war crimes, as required under Article 17 of the Rome Statute,⁹² as well as the extent to which the UK is examining the same person/conduct as the ICC, which is also, as demonstrated in *Lubanga*, a requirement for a State to comply with the principle of complementarity, and therefore render a case inadmissible at the ICC.⁹³

As was referred to earlier in this chapter, the term in grievous bodily harm, as held in *DPP v Smith*, refers to causing 'really serious' harm.⁹⁴ As stated by Treacy LJ in *Golding*, 'Ultimately, the assessment of harm done in an individual case in a contested trial will be a matter for the jury, applying contemporary social standards.'⁹⁵ Additionally, in *Bollom*, it was stated that when 'deciding whether injuries are grievous, an assessment has to be made of, amongst other things, the effect of the harm on the particular individual.'⁹⁶

In relation to physical harm caused, it is clear that the required level for an offence to constitute GBH is higher than the standard required for the offence of Assault occasioning Actual Bodily Harm (ABH) found within s.47 of the Offences Against the Person Act 1861. For example, in *Savage and Parmenter*, Mustill LJ stated:

"Although the maximum sentences for offences under section 20 and 47 are the same, and although the sentences imposed in practice for the worst section 47 offences will overlap those imposed at the lower end of section 20, nobody could doubt that the two offences are seen in quite different terms"⁹⁷

In *Chan-Fook*, it was stated that level of harm required for the offence of ABH is such that 'the injury (although there is no need for it to be permanent) should

⁹² Rome Statute (n 16), Article 17

⁹³ *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 (10 February 2006), para 31

⁹⁴ *DPP v Smith* (n 63) 334

⁹⁵ *R v Golding* [2014] EWCA Crim 889, para 64

⁹⁶ *R v Bollom* [2003] EWCA Crim 2846, para 52

⁹⁷ *R v Savage, DPP v Parmenter* [1992] 1 AC 699, 711

not be so trivial as to be wholly insignificant'.⁹⁸ The UK Manual of Service Law states in relation to the level of harm related for ABH:

"It is appropriate to charge this offence in cases where there is: loss of or breaking of a tooth; temporary loss of sensory function (e.g. loss of consciousness); extensive or multiple bruising; minor fractures; minor but more than superficial, cuts requiring medical treatment."⁹⁹

In relation to psychiatric harm, it was held in *Ireland* that "bodily harm" in sections 18, 20 and 47 must be interpreted so as to include recognisable psychiatric illness'.¹⁰⁰ In order to state that bodily harm was caused as a result of psychiatric harm, it was held in *Chan-Fook* that this requires expert evidence:

"In any case where psychiatric injury is relied upon as the basis for an allegation of bodily harm, and the matter has not been admitted by the defence, expert evidence should be called by the prosecution. It should not be left to be inferred by the jury from the general facts of the case. In the absence of appropriate expert advice a question whether or not the assault occasioned psychiatric injury should not be left to the jury."¹⁰¹

In relation to the required level of *mens rea* for GBH under s.20, in *Mowatt*, Diplock LJ stated that:

"It is quite unnecessary that the accused should have foreseen that his unlawful act might cause physical harm of the gravity described in the section... It is enough that he should have foreseen that some physical harm to some person, albeit of a minor character might result."¹⁰²

⁹⁸ *R v Chan-Fook* [1994] 1 WLR 689, 694

⁹⁹ Ministry of Defence (n 12) 1-8-12

¹⁰⁰ *R v Ireland* [1998] AC 147, 159

¹⁰¹ *Chan-Fook* (n 98) 696

¹⁰² *R v Mowatt* [1968] 1 QB 421, 426

In relation to s.18, which has the same *actus reus* as s.20, the *mens rea* required as held in *Taylor* is that ‘there must be an intent to cause really serious bodily injury’.¹⁰³

As has already been stated, one of IHAT’s investigatory priorities was ‘allegations of serious ill treatment including rape, sexual assaults and Grievous Bodily Harm’.¹⁰⁴ This is potentially problematic as, in relation to potentially analogous conduct, the investigative focus of the OTP has centred around allegations relating to torture and inhuman treatment, as well as outrages upon personal dignity.¹⁰⁵ It is not always clear that the offences falling within the OTP’s focus are necessarily the same as GBH.

For example, the ICC Elements of Crimes states that the war crime of torture under Articles 8(2)(a)(ii) and 8(2)(c)(i) requires that ‘the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons’.¹⁰⁶ However, as shown by the International Criminal Tribunal for Yugoslavia in *Brđanin*, this does not necessarily require the same type of harm as GBH, as it is stated, ‘Acts inflicting physical pain may amount to torture even when they do not cause pain of the type accompanying serious injury. An act may give rise to a conviction when it inflicts severe pain and suffering.’¹⁰⁷

Additionally, in the civil case of *Alseran*, where the Court of Appeal held that British military personnel were responsible for a number of violations of Article 3 of the European Convention on Human Rights, it is not clear that in all instances the harm suffered would reach the level of harm required to constitute grievous bodily harm.¹⁰⁸ For example, Alseran, who, along with other detainees was

¹⁰³ *R v Taylor* [2009] EWCA Crim 544, para 3. See also the wording in the Statute, Offences against the Person Act 1861, s.18

¹⁰⁴ ‘IHAT Quarterly Update April-June 2017’ (n 4) 2

¹⁰⁵ Office of the Prosecutor (n 1) para 71

¹⁰⁶ International Criminal Court, *Elements of Crime* (International Criminal Court 2013) <<https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>> (Last accessed 15 May 2021), 10 and 22

¹⁰⁷ *Prosecutor v Brđanin* (Judgement) IT-99-36-A (3 April 2007), para 251

¹⁰⁸ *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB); Article 3 of the European Convention on Human Rights states ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’: Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Article 3.

forced to lay down on their stomachs before soldiers walked on their backs,¹⁰⁹ 'has suffered from anxiety and depression, as well as outbursts of anger and other symptoms of trauma' as a result,¹¹⁰ though psychiatrists who assessed Alseran's psychiatric condition described his 'current psychiatric symptoms as mild or moderate in their severity'.¹¹¹ It appears that had action been brought about in relation to Alseran earlier, his symptoms may have reached the threshold required for GBH since it is stated that 'there appeared to be some recent improvement in his trauma symptoms, probably due to psychological treatment that he has recently commenced'.¹¹² It should, however, be noted that the conduct suffered by Alseran has had a profound impact, as Leggatt J stated:

"the incident at Al-Seeba in which soldiers deliberately ran over the backs of prisoners clearly crossed the threshold level of severity to amount to a breach of article 3. Those assaults involved the gratuitous infliction of pain and humiliation for the amusement of those who perpetrated them. They have caused Mr Alseran deep and long-lasting feelings of anger and mental anguish and were an affront to his dignity as a human being. I find that they constituted both inhuman and degrading treatment."¹¹³

Another of the claimants, MRE suffered from a corneal laceration when subjected to hooding due to 'an unidentified sharp object (such as a shard of glass) that was in the bag'.¹¹⁴ It is unclear whether there was either the prerequisite mental element to support any charge for offences under sections 18 or 20 of the Offences Against the Person Act 1861, including for wounding, if the object in the bag wasn't known about, and since hooding was 'used for reasons of operational security'.¹¹⁵ Whilst this does not serve to justify hooding, which has been held to constitute inhuman treatment by the European Court of

¹⁰⁹ *Alseran* (n 108) para 163

¹¹⁰ *ibid* para 169-170

¹¹¹ *ibid* para 170

¹¹² *ibid*

¹¹³ *ibid* para 233

¹¹⁴ *ibid* para 379

¹¹⁵ *ibid* para 494

Human Rights,¹¹⁶ it does provide another example of the fact that inhuman treatment and GBH are not necessarily the same.

A final incident to be discussed in connection with *Alseran* which does not appear to meet the required threshold for GBH is that one of the claimants, Al-Waheed, was held to have suffered a cut above his left eye and a pattern of bruising to his upper body caused by British soldiers when being transported to Basra Airport.¹¹⁷ This is conduct which was held to constitute inhuman treatment under Article 3 of the ECHR.¹¹⁸ The injuries in this case, however, appear to be more consistent with the level of harm required for the offence of ABH, discussed above, than they do with the level of harm required for GBH. To this end, Bates argues that this case ‘raises questions about the MOD’s closure of hundreds of potentially similar cases’,¹¹⁹ and that the breadth of European Court of Human Rights case law addressing Article 3 of the ECHR ‘expresses the qualitative breadth and depth of conduct prohibited by Article 3; concepts missing from the Service Police’s wrong-headed choice to continue investigations only where the ill-treatment alleged reached the threshold of grievous bodily harm’.¹²⁰

Injuries suffered in *Alseran* that may reach the threshold required for GBH include an incident in which ‘MRE was hit on the head with what must have been a rifle butt, an assault which has caused him some permanent disability’.¹²¹ CPS Charging guidelines for the offence of GBH state that ‘Life-changing injuries should be charged as GBH’.¹²² An injury which results in a disability would appear to fall within this category. As MRE was hit by the rifle

¹¹⁶ *Ireland v UK* (1978) Series A no 25, para 168. Additionally, in *Alseran* (n 108), Leggatt J held that the use of hooding constituted inhuman treatment at para, and was critical of the MoD for not accepting that the use of hooding constituted inhuman treatment in all circumstances at para 495

¹¹⁷ *Alseran* (n 108) para 654

¹¹⁸ *ibid* para 657

¹¹⁹ Bates (n 7) 723

¹²⁰ *ibid* 727

¹²¹ *Alseran* (n 108) para 500

¹²² Crown Prosecution Service, ‘Offences against the Person, incorporating the Charging Standard’ (Crown Prosecution Service, 6 January 2020) <<https://www.cps.gov.uk/legal-guidance/offences-against-person-incorporating-charging-standard>> (Last accessed 15 May 2021)

butt whilst hooded, this was held to be inhuman treatment for the purposes of Article 3 of the ECHR.¹²³

6. Conclusion

It is clear that the UK has a judicial system capable of trying cases involving alleged war crimes – the UK scored full marks on judicial independence and due process, for instance, in Freedom House’s *Freedom in the World 2020* report,¹²⁴ and the OTP has acknowledged that the UK has taken action to address accusations of alleged wrongdoing.¹²⁵ Whether the UK’s investigative focus is centred around ensuring accountability for war crimes is unclear. Whilst this chapter has highlighted that there are numerous ways through which the UK can prosecute the conduct underlying war crimes, there have been a total of five prosecutions for offences against Iraqi civilians.¹²⁶ However, even when onerous evidential thresholds and differences in definitions between offences in domestic law and international law are taken into account, the UK should still be able to effectively investigate alleged war crimes. The following chapters will therefore assess the UK’s use of a non-criminal investigation process in the form of the Baha Mousa Report, and the IHAT criminal investigation process, before examining the potential impact of the Overseas Operations (Service Personnel and Veterans) Bill on investigations.

¹²³ Alseran (n 108) para 500

¹²⁴ Freedom House, ‘Freedom in the World: United Kingdom’ (Freedom House) <<https://freedomhouse.org/country/united-kingdom/freedom-world/2020>> (Last accessed 15 May 2021)

¹²⁵ Office of the Prosecutor (n 3) para 167

¹²⁶ Ministry of Defence (n 32)

Chapter Six: The Baha Mousa Inquiry

This Chapter will discuss the Baha Mousa Inquiry Report and its potential impact on the UK's ability to demonstrate that it has complied with the principle of complementarity. This Report has been cited by the International Criminal Court (ICC) Office of the Prosecutor (OTP) as having been a source of information used by the OTP in order to determine whether a request should be made to launch an investigation in relation to the conduct of United Kingdom military personnel in Iraq.¹

The inquiry which forms the focus of this Chapter was set up under the Inquiries Act 2005,² s.2(1) of which states 'An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability'.³ The explanatory notes to this section of the act explain that this is the case because 'the aim of inquiries is to help to restore public confidence in systems or services by investigating the facts and making recommendations to prevent recurrence, not to establish liability or to punish anyone.'⁴ However, s.2(2) of the Act states that 'an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.'⁵ To further emphasise the non-criminal nature of the Baha Mousa Inquiry, the Report notes that it 'obtained from the Attorney General and undertaking that evidence given by an individual witness could not be used against that same witness in any subsequent prosecution.'⁶

Additionally, as shown by Chapter 1 of Part XV of the Baha Mousa Inquiry Report, it is clear that inquiries are allowed to pursue an examination of events which are not explicitly included within the terms of reference originally

¹ Office of the Prosecutor, 'Situation in Iraq/UK: Final Report' (Office of the Prosecutor, 9 December 2020) <<https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>> (Last accessed 15 May 2021), 20-28, for example.

² HC Deb 14 May 2008 vol 475 cols 60WS-61WS

³ Inquiries Act 2005, s.2(1)

⁴ Explanatory Notes to the Inquiries Act 2005, para 8

⁵ Inquiries Act 2005, s.2(2).

⁶ Sir William Gage, *The Report of the Baha Mousa Inquiry: Volume I* (2011-2012, HC 1452-I), para 2.2

provided.⁷ In this instance, the inquiry determined that it could investigate steps that had been taken by the UK military in relation to the use of, and policy surrounding, hooding, tactical questioning and interrogation following the death of Baha Mousa.⁸ This means that whilst the Inquiry to be discussed in this Chapter is not a not criminal investigation, it does potentially satisfy the criteria of the principle of complementarity, articulated in Article 17 of the Rome Statute which only allows the ICC to assert jurisdiction in situations where ‘the State is unwilling or unable genuinely to carry out the investigation or prosecution’,⁹ by providing for an investigation of the facts and by contributing to the process to prevent the recurrence of potentially criminal acts. However, as will be noted throughout the chapter, the Baha Mousa Report does feature some notable weaknesses which may undermine its ability to effectively contribute to the complementarity process.

This means that the objective of this Chapter, in common with the focus of Chapter Three which examined the United States Senate Reports in relation to alleged wrongdoing connected to the conflict in Afghanistan,¹⁰ is to determine whether it is possible for a non-criminal process to contribute towards a State’s ability to argue that it has satisfied the principle of complementarity.

On 21 July 2008, the United Kingdom Defence Secretary, Des Browne, announced that the terms of reference for the Baha Mousa Inquiry would be:

“To investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him, taking account of the investigations which have already taken place, in particular where responsibility lay for approving the practice of conditioning detainees by any members of the 1st Battalion The Queen’s Lancashire Regiment in Iraq in 2003, and to make recommendations.”¹¹

⁷ Sir William Gage, *The Report of the Baha Mousa Inquiry: Volume III* (2011-2012, HC 1452-III), Part XV ch 1

⁸ *ibid* para 15.3

⁹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 17(1)(a)

¹⁰ *supra* Chapter Three

¹¹ HC Deb 21 July 2008 vol 479 col 65WS

As is made clear in the Inquiry Report, a major focus was on five interrogation techniques, ‘wall postures, hooding, noise deprivation of sleep, and deprivation of food and water’,¹² which were prohibited by Prime Minister Edward Heath in March 1972.¹³ In 1978, these techniques were deemed by the European Court of Human Rights in *Ireland v UK* to constitute inhuman and degrading treatment under Article 3 of the European Convention on Human Rights (ECHR).¹⁴ In the case of *Selmouni v France*, it was however noted that ‘certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future.’¹⁵

This inquiry is of value from the international criminal law perspective not only because, as identified by the OTP in Preliminary Examination Reports, it identifies the practices of the personnel involved in the military operations in Iraq,¹⁶ but also because the Report identifies reasons why the United Kingdom may have chosen not to pursue extensive prosecutions in relation to the crimes alleged by the OTP. This is because of systemic issues in relation to prisoner handling, interrogation and tactical questioning doctrine and policy which may not necessarily be the fault of any one individual.

It is these systemic issues, rather than the death of Baha Mousa itself, which will be the focus of this Chapter’s discussion of the Baha Mousa Inquiry Report. The main reason for this exclusion is that court martials have already taken place in relation to the death of Baha Mousa,¹⁷ and the SPLI examination into the death of Baha Mousa ended without any further prosecutions.¹⁸ The focus

¹² Baha Mousa Inquiry Report Volume I (n 6) para 1.37

¹³ HC Deb 2 March 1972 vol 832 cols 743-44

¹⁴ See generally, Baha Mousa Inquiry Report Volume I (n 6) part I ch 2; *Ireland v UK* (1978) Series A No 25 para 168; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Article 3

¹⁵ *Selmouni v France* 1999-V, para 101

¹⁶ Office of the Prosecutor, Report on Preliminary Examinations 2016’ (International Criminal Court, 14 November 2016) <https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf> (Last accessed 15 May 2021), para 101

¹⁷ For a discussion of these prosecutions which resulted in Corporal Donald Payne pleading guilty to inhuman treatment, see Baha Mousa Inquiry Report Volume I (n 6) paras 1.29-1.30 and Nathan Rasiah ‘The Court-martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice’ (2009) 7 *Journal of International Criminal Justice* 177

¹⁸ OTP Final Report (n 1) para 215

will primarily be on three strands: the lack of developed and widely communicated policy on prisoner handling, tactical questioning and interrogation which allowed the five techniques to be used in Iraq, attempts to ban the use of the technique of hooding during Operation Telic 1, and the response of the Ministry of Defence and the UK military to recommendations made by the Inquiry to address the systemic issues raised.

1. The Development of Doctrine Regarding the Five Techniques

This section addressing the development of doctrine will summarise the findings of the Baha Mousa Report in relation to the development of doctrine – this will be done in three sections, the first two mirroring the construction of the Baha Mousa Report. The first section will address policy implemented up until the 1990s, and the second will discuss the policies implemented between 1997 and the beginning of the conflict in Iraq. Following this summary, the potential impact of the findings on UK prosecutorial policy will be discussed.

a. The Early Development of Doctrine

i. The Heath Declaration and the Directive on Interrogation by the Armed Forces in Internal Security Operations

The Report of the Baha Mousa Inquiry made it clear that the development of policy in relation to prisoner handling, interrogation and tactical questioning has been problematic since the 1970s. On 2 March 1972, the Prime Minister Edward Heath announced that ‘the government, having reviewed the whole matter with great care and with particular reference to any future operations, have decided that the techniques... will not be used in future as an aid to interrogation’,¹⁹ and that a Directive had been issued to this effect.²⁰ The Inquiry Report states that the effect of this ban was unambiguous – it was intended to

¹⁹ HC Deb 2 March 1972 vol 832 col 744; Sir William Gage, *The Report of the Baha Mousa Inquiry: Volume II* (2011-2012, HC 1452-II), para 4.71

²⁰ HC Deb 2 March 1972 vol 832 col 745; Baha Mousa Inquiry Report Volume II (n 19) para 4.72

have a global effect and it was designed not to have any temporal limitations.²¹ The Directive issued, entitled *Directive on Interrogation by the Armed Forces in Internal Security Operations*, states:

“When British forces are operating in aid of the civil power, the conduct of interrogation is a matter for the civil authorities. If, in exceptional circumstances, the civil authority is unable to carry out interrogation, the principles and procedures set out in this directive shall apply to Service personnel who may be employed for this purpose. Before Service personnel are used for interrogation, the approval of United Kingdom Ministers will be sought.”²²

The directive then states that the UK is under a number of obligations in international law to ensure that individuals ‘are at all times to be treated humanely and not be subjected to torture or cruel, inhuman or degrading treatment’.²³ The directive also confirms that in the context of an interrogation:

“no form of coercion is to be inflicted on persons being interrogated. Persons who refuse to answer questions are not to be threatened, insulted, or exposed to other forms of ill treatment. Techniques such as the following are prohibited:

- a. any form of blindfold or hood;
- b. the forcing of a subject to stand or to adopt any position of stress for long periods to induce physical exhaustion;
- c. the use of noise producing equipment;
- d. deliberate deprivation of sleep;
- e. the use of a restricted diet to weaken a subject’s resistance.”²⁴

²¹ Baha Mousa Inquiry Report Volume II (n 19) paras 4.85-4.87

²² Joint Intelligence Committee, ‘Directive on Interrogation by the Armed Forces in Internal Security Operations’ (Cabinet Office, 29 June 1972) para 2

²³ *ibid* para 5

²⁴ *ibid* para 7

Sir William Gage expressed criticism of the limitations of the Directive, stating that ‘this can be seen now to have contributed over time to the loss of MoD corporate knowledge about the prohibition and its extent’.²⁵

This loss of knowledge manifested itself in such a manner that the Report found that:

“by 2002/2003, none of the pre-prepared handouts or PowerPoint presentations for the PH&TQ and Interrogation courses included a reference to the Heath Statement, 1972 Directive or specifically to the prohibition on the five techniques as a distinct part of the applicable doctrine.”²⁶

Additionally, officers throughout the chain of command were unaware of the events leading to the prohibition of the five techniques including the Chief of Joint Operations at the Permanent Joint Headquarters, Lieutenant General Sir John Reith who was not aware of the 1972 Directive;²⁷ the most senior Human Intelligence officer in 1 (UK) Division during Operation Telic, Lieutenant Colonel S002 who was also unaware of the Directive;²⁸ and within the Battlegroup responsible for the death of Baha Mousa, the commanding officer, Lieutenant Colonel Jorge Mendonça stated that he didn’t remember reading Heath’s declaration.²⁹ This was also the case with the Adjutant, Captain Mark Moutarde,³⁰ and the Battlegroup Internment Review Officer, Major Michael Peebles.³¹

Furthermore, in relation to a set of emails sent by the officer commanding F Branch (who were responsible for Prisoner Handling and Tactical Questioning training) which stated that training had to rigidly conform to previously set

²⁵ Baha Mousa Inquiry Report Volume II (n 19) para 4.115(4)

²⁶ *ibid* para 6.341. The term PH&TQ refers to prisoner handling and tactical questioning.

²⁷ *ibid* para 7.154

²⁸ *ibid* para 8.102

²⁹ Baha Mousa Inquiry Report Volume I (n 6) para 2.1603

³⁰ *ibid* para 2.1525

³¹ *ibid* para 2.969

guidelines due to the risk of increased scrutiny,³² the Report stated that they ‘suggest that knowledge of the 1972 prohibition of the techniques was not all that it might have been even amongst the instructors’.³³

The lack of knowledge of the Heath Declaration, and the Directive implementing it is of significance because the techniques prohibited were subject to scrutiny by the European Court of Human Rights in the years following Heath’s announcement to the House of Commons. The European Commission on Human Rights stated in *Ireland v United Kingdom* that whilst the individual techniques of sleep deprivation or dietary restrictions may not in of themselves always constitute a violation of Article 3 of the ECHR,³⁴ but:

“It is this character of the combined use of the five techniques which, in the opinion of the Commission, renders them in breach of Art. 3 of the Convention in the form not only of inhuman and degrading treatment, but also of torture within the meaning of that provision.”³⁵

The European Court of Human Rights, however, disagreed on Commission’s finding of torture, stating that the use of the techniques ‘did not occasion suffering of the particular intensity and cruelty implied by the word torture’.³⁶ The Court instead found that the techniques constituted inhuman and degrading treatment under Article 3 of the ECHR.³⁷ Whether a similar finding would be made today is unclear, as in *Selmouni v France*, the European Court of Human Rights suggested that acts previously classified as inhuman treatment may now be classified as torture, stating:

³² Baha Mousa Inquiry Report Volume II (n 19) paras 6.312-6.313; S012, ‘Hooding’ (12 May 2004) <https://webarchive.nationalarchives.gov.uk/20120215214006/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_040510/mod028364.pdf> (Last accessed 15 May 2021); and S012, ‘PH&TQ and Interrogation’ (11 May 2004) <https://webarchive.nationalarchives.gov.uk/20120215214010/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_040510/mod028363.pdf> (Last accessed 15 May 2021)

³³ Baha Mousa Inquiry Report Volume II (n 19) para 6.317

³⁴ *Ireland v United Kingdom* App no 5310/71 (Commission Decision, 25 January 1976), 401

³⁵ *ibid* 402

³⁶ *Ireland v United Kingdom* (n 14) para 167

³⁷ *ibid* para 168

“the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.”³⁸

In the context of UK courts, it is also possible that the use of the five techniques may no longer be classified as inhuman treatment, since after quoting the *Selmouni* judgment, Lord Bingham stated *obiter* in *A v Secretary of State for the Home Department* that ‘It may well be that the conduct complained of in *Ireland v United Kingdom*... would now be held to fall within the definition in article 1 of the Torture Convention’.³⁹ Whilst this case took place in 2005, and therefore after the conduct discussed in the Baha Mousa Inquiry Report took place, it does emphasise the unacceptable nature of the alleged conduct of some UK personnel in Iraq.

The prohibition of torture and inhuman and degrading treatment under Article 3 of the European Convention on Human Rights is just one of a number of provisions in international law under which the United Kingdom has obligations to ensure that torture and inhuman treatment do not take place including, but not limited to, the Torture Convention,⁴⁰ the Geneva Conventions,⁴¹ and the

³⁸ *Selmouni v France* (n 15) para 101

³⁹ *A v Secretary of State for the Home Department* [2005] UKHL 71, para 53

⁴⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (adopted 10 December 1984, entered into force 26 June 1987), Articles 1 and 16

⁴¹ For example, ‘torture or inhuman treatment’ constitute grave breaches under the Geneva Conventions: Geneva Convention For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted August 12 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I), Article 50; Geneva Convention For the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II), Article 51; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III), Article 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV), Article 147. Additionally, Common Article 3 to Geneva Conventions I-

International Covenant on Civil and Political Rights (ICCPR).⁴² Additionally, torture and cruel, inhuman or degrading treatment are also prohibited as a matter of customary international law.⁴³ Furthermore, as discussed in the previous chapter, there are multiple mechanisms through which a prosecution can be brought for offences involving mistreatment of detainees.

In relation to the application of the Torture Convention, the UK government stated that it did apply to the conduct of UK personnel overseas with Roger Hutton, the Joint Commitments Policy Director at the Ministry of Defence, testifying before the Joint Committee on Human Rights that ‘we accept that UNCAT does apply to our troops overseas because it has been enshrined in British law in section 134 of the Criminal Justice Act 1988 and therefore British soldiers carry it with them.’⁴⁴ However, in a 2006 Report on the Torture Convention, the Joint Committee on Human Rights were critical of UK military training documents for not including references to the Torture Convention,⁴⁵ and stated that:

IV prohibits ‘cruel treatment and torture’ – a standard which applies in both international and non-international armed conflicts, as the International Court of Justice stated in *Military and Paramilitary Activities in and Against Nicaragua* that ‘in the event of international armed conflicts, these rules also constitute a minimum yardstick’: *Military and Paramilitary Activities in and against Nicaragua* (1986) ICJ Reports 14, para 218.

⁴² International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 26 March 1976) (ICCPR) 999 UNTS 171, Article 7. It is worth noting, however, that in the context of the ICCPR, the Human Rights Committee expressed criticism of the UK’s views regarding the application of the ICCPR overseas, stating in their concluding observations on the UK’s sixth periodic report to the Committee that ‘The Committee is disturbed about the State party’s statement that its obligations under the Covenant can only apply to persons who are taken into custody by the armed forces and held in British-run military detention facilities outside the United Kingdom in exceptional circumstances.’: Human Rights Committee, ‘Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: United Kingdom of Great Britain and Northern Ireland’ (30 July 2008) UN Doc CCPR/C/GBR/CO/6, para 14. In response, the UK stated, ‘We are prepared to accept that the UK’s obligations under the ICCPR could in principle apply to persons taken into custody by UK forces and held in military detention facilities outside the UK. However, any such decision would need to be made in the light of the specific circumstances and facts prevailing at the time.’: Human Rights Committee, ‘Information received from the United Kingdom of Great Britain and Northern Ireland on the implementation of the concluding observations of the Human Rights Committee (CCPR/C/GBR/CO/6)’ (3 November 2009) UN Doc CCPR/C/GBR/CO/6/Add.1, para 24

⁴³ See for example, International Committee of the Red Cross, ‘Rule 90. Torture and Cruel, Inhuman or Degrading Treatment’ (International Humanitarian Law Database) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule90> (Last accessed 15 May 2021)

⁴⁴ Joint Committee on Human Rights, *The UN Convention Against Torture (UNCAT) Volume II* (2005-2006, HL 185-II, HC 701-II), Ev 62

⁴⁵ Joint Committee on Human Rights, *The UN Convention Against Torture (UNCAT) Volume I* (2005-2006, HL 185-I, HC 701-I), para 80

“Irrespective of the Government position on the legal application of UNCAT obligations to territories outside the UK which are under its control, we consider that, as a matter of good practice, training and guidance should contain information on the Convention and the obligations it imposes.”⁴⁶

The UK, even after the Iraq War had concluded adopted the following position, as stated in *Al-Saadoon*:

“There is a question as to the territorial scope of UNCAT which turns on what is meant by the words “in any territory under its jurisdiction” used in (among other provisions) articles 2, 11, 12 and 13. The Secretary of State takes a narrow view of his phrase and does not accept that it applies to any part of Iraq at any time when British forces were present in Iraq. It is therefore his position that UNCAT did not require the UK to take any measures to prevent acts of torture (or other forms of cruel, inhuman or degrading treatment) by its soldiers in Iraq.”⁴⁷

This is the case even though the UK’s position has been subject to criticism from the Joint Committee on Human Rights,⁴⁸ and the Torture Committee.⁴⁹

Regardless of the UK’s position on the application of international instruments to operations overseas, it does appear perplexing that UK troops were not made aware of a prohibition on specific forms of conduct that had in the past been held to constitute cruel and inhuman treatment, especially when the

⁴⁶ *ibid*

⁴⁷ *R (Al-Saadoon and Others) v Secretary of State for Defence* [2015] EWHC 715 (Admin), para 263

⁴⁸ Joint Committee on Human Rights (n 45) para 73

⁴⁹ United Nations Committee against Torture, ‘Conclusions and recommendations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories’ (10 December 2004) UN Doc CAT/C/CR/33/3, para 4(b). See also United Nations Committee Against Torture, ‘General Comment No. 2: Implementation of article 2 by States parties’ (24 January 2008) UN Doc CAT/C/GC/2, para 5 for discussion of the nature of the prohibition on torture under the Torture Convention and para 7 for discussion of the territorial application of the Torture Convention.

Service Discipline Acts meant that English law applied to UK military personnel wherever they were in the world.⁵⁰ This is especially the case since, in June 2007, Attorney General Lord Goldsmith stated the following in relation to the standards required by UK personnel:

“I do not believe, so far as the substantive standards of treatment are concerned, there is any difference between what the Geneva Convention, the Convention Against Torture require in relation to detention and the ECHR. I do not think there is any difference at all... and I am not aware that anyone ever thought there was something that was permitted under the Geneva Conventions that it not permitted under the ECHR.”⁵¹

Goldsmith also stated in relation to the use of the five techniques, ‘there is a matter of grave concern as to how these techniques came to be used, who authorised them and on what basis’,⁵² that he was not asked to advise on the legality of the use of the five techniques before the start of the armed conflict in Iraq,⁵³ and that he only became aware of the use of the techniques following the death of Baha Mousa.⁵⁴ In relation to his specific views on the application of the ECHR, Goldsmith argued that ‘So far as the substantive standards of treatment are concerned, it has always been my view that Articles 2 and 3 apply overseas to the actions of British soldiers who are holding civilians in UK-run detention facilities.’⁵⁵ The exact nature of legal advice provided by Goldsmith to the MoD, however, is unclear since Sir William Gage held that ‘the documents which form the Advice remain confidential and I cannot direct that any of them be produced

⁵⁰ See supra Chapter Five for discussion.

⁵¹ Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* (2006-2007, HL 157, HC 394), Ev 39

⁵² *ibid* Ev 41

⁵³ *ibid* Ev 39

⁵⁴ *ibid*

⁵⁵ *ibid*

by the MoD'.⁵⁶ In any event, the High Court,⁵⁷ Court of Appeal,⁵⁸ and House of Lords in *Al-Skeini* that the ECHR did apply in the case of Baha Mousa.⁵⁹ Additionally, the European Court of Human Rights confirmed that the ECHR did apply to in relation to UK military operations in Iraq.⁶⁰

ii. Subsequent Policy Developments

Following the implementation of the 1972 Directive, attempts were made to raise the issue of interrogation and prisoner treatment policy in the context of an international armed conflict. In September 1973, the Brigadier General Staff (Intelligence) for the Defence Intelligence Staff contacted the Vice Chief of the General Staff to state that existing policy was obsolete and that there was no policy on interrogating prisoners of war.⁶¹ This led to a response from the Vice Chief of the General Staff recommending that a new policy incorporating the 1972 Directive be implemented.⁶² The Joint Service Publication – JSP 120(6) - which carried out this instruction was not published until almost six years had passed after the initial request was made,⁶³ did not include any reference to the five techniques.⁶⁴ It did, however, state that Prisoners of War must be treated in compliance with the Geneva Conventions,⁶⁵ and set out guidance on when sight deprivation could be used for security purposes.⁶⁶

The Baha Mousa Inquiry Report found that there were seven reasons why the failure to include references to the five techniques was 'not a failure that could

⁵⁶ Sir William Gage, 'Attorney-General's Advice Ruling' (Baha Mousa Inquiry, 1 April 2010) <https://webarchive.nationalarchives.gov.uk/20120215220327/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings/bmpi-agruling310310v1.pdf> (Last accessed 15 May 2021), para 46; Baha Mousa Inquiry Report Volume II (n 19) para 8.235

⁵⁷ *R (on the Application of Al-Skeini and Others) v Secretary of State for Defence* [2004] EWHC 2911 (Admin)

⁵⁸ *R (on the Application of Al-Skeini and Others) v Secretary of State for Defence* [2005] EWCA Civ 1609

⁵⁹ *R (on the Application of Al-Skeini and Others) v Secretary of State for Defence* [2007] UKHL 26

⁶⁰ *Al-Skeini and Others v United Kingdom* App no 55721/07 (ECtHR, 7 July 2011)

⁶¹ Baha Mousa Inquiry Report Volume II (n 19) para 4.126

⁶² *ibid* para 4.128

⁶³ *ibid* para 4.150

⁶⁴ *ibid* para 4.152

⁶⁵ *ibid* para 4.151

⁶⁶ *ibid* para 4.153

only have been appreciated with hindsight'.⁶⁷ These included the initial request to create a policy which incorporated the 1972 Directive,⁶⁸ that 'the prohibited techniques had previously been taught to those UK personnel attending training courses at Ashford. Clear guidance ought to have been provided to make the illegality of their use in warfare abundantly clear',⁶⁹ and that the Attorney General as part of the *Ireland v United Kingdom* proceedings had given an assurance that the five techniques would not be used in the context of interrogations.⁷⁰

The Report was additionally critical of the guidance provided, stating that 'the MoD failed to ensure that the updated guidance on interrogation of prisoners included a reference to the prohibition on the five techniques',⁷¹ and that 'this historical failure contributed to the entirely unacceptable situation that no Op Telic Order, nor any readily accessible MoD doctrine at the time of Baha Mousa's death referred to the prohibition on the five techniques'.⁷² This publication was replaced in 1999 by Joint Warfare Publication 2-00,⁷³ about which the Report stated 'In contrast to JSP 120(6), there was no guidance at all on sight deprivation. Nothing was said about questioning prisoners of war. References to interrogators in JWP 2-00 were limited and incidental'.⁷⁴

The Report is also critical of the failure in 1990 to incorporate the prohibition of the five techniques into Joint Service Publication 391 on the basis that it was 'a missed opportunity to ensure that the prohibition became properly entrenched in the MoD doctrine'.⁷⁵

⁶⁷ *ibid* para 4.157

⁶⁸ *ibid* para 4.157(1)

⁶⁹ *ibid* para 4.157(4)

⁷⁰ *ibid* para 4.157(7)

⁷¹ *ibid* para 4.158(1)

⁷² *ibid* para 4.158(3)

⁷³ *ibid* para 5.20

⁷⁴ *ibid* para 5.23

⁷⁵ *ibid* para 4.164(3)

b. Development of Policy: 1997-2003

A policy review was carried out by the Joint Services Intelligence Organisation over the course of 1996 and 1997, which the Baha Mousa Inquiry Report states 'arose initially out of consideration of which non-UK nationals should be permitted to attend Joint Service Intelligence Organisation (JSIO) interrogation courses.'⁷⁶ In the period when the policy review was conducted, Defence Intelligence Commitments distributed papers which referred to the 1972 Directive,⁷⁷ as well as the decision of the European Court of Human Rights in *Ireland v United Kingdom*.⁷⁸ The papers also acknowledged that interrogation policy differed depending on the type of armed conflict,⁷⁹ and that the use of the five techniques would be inconsistent with the United Kingdom's legal obligations regardless of the type of armed conflict taking place.⁸⁰

The policy circulated as a result of the review stated that 'Interrogation methods employed during all operations should comply with the Geneva Conventions and international and domestic law',⁸¹ and further stated that 'Procedures used by UK interrogators in an operational theatre should be governed by a detailed directive that incorporates current legal advice and is issued on behalf of the UK Joint Commander'.⁸² The Baha Mousa Inquiry Report stated that the 1997 Policy itself did not affect the prohibition of the five interrogation techniques introduced by the 1972 Directive,⁸³ and sought to ensure that all operations were conducted in a manner which satisfied the United Kingdom's legal obligations.⁸⁴ However, the inquiry did criticise the policy's failure to take the opportunity to end policy differentiation between interrogations conducted in international armed conflicts and those conducted in non-international armed

⁷⁶ *ibid* paras 5.1

⁷⁷ *ibid* paras 5.2 and 5.5

⁷⁸ *ibid* para 5.5

⁷⁹ *ibid* paras 5.2-5.3

⁸⁰ *ibid* paras 5.6-5.7

⁸¹ Lieutenant General Sir John Foley, 'Interrogation and Related Activities' (21 July 1997) 3; *ibid* para 5.15

⁸² Foley (n 81) 3; Baha Mousa Inquiry Report Volume II (n 19) para 5.15

⁸³ Baha Mousa Inquiry Report Volume II (n 19) para 5.17

⁸⁴ *ibid*

conflicts,⁸⁵ even though those who were responsible for the drafting of the policy understood that the five techniques were banned regardless of the type of conflict.⁸⁶

The 1997 policy was however completely ignored in a subsequent review of policy conducted by the Joint Service Intelligence Organisation in 1999-2000,⁸⁷ with the Baha Mousa Inquiry Report stating that the officer responsible for the review, S040, only 'saw the policy for the first time on this inquiry's website'.⁸⁸ The covering minute for the report produced by the Joint Service Intelligence Organisation did, however, state that 'It is evident that the interrogation function has not been properly addressed for several years... Direction and firm policy need to be the start point for any re-examination'.⁸⁹ The Baha Mousa Inquiry Report however states 'Despite this clear identification of a need for "direction and firm policy" no further policy or doctrine on tactical questioning or interrogation was drafted between 2 May 2000 and Baha Mousa's death in September 2003'.⁹⁰

Instead, the Report highlights that in the lead up to the armed conflict in Iraq, the focus was on the development of intelligence capability rather than on the development of interrogation doctrine.⁹¹ Whilst a Joint Warfare Publication was published in 2001, JWP 1-10, entitled 'Prisoners of War Handling',⁹² the Report states 'while JWP 1-10 made clear the need to treat prisoners humanely, it did not contain any reference to the prohibition on the five techniques'.⁹³ It was further noted in the Report that if there had been definitive guidance on the five techniques contained within JWP 1.10, there would have been no doubts over the legality of the techniques.⁹⁴ It was then shown that at the start of the Iraq War, the only policy guidelines which actually addressed prohibited

⁸⁵ *ibid* paras 5.18 and 5.139

⁸⁶ *ibid* para 5.18

⁸⁷ *ibid* paras 5.28-5.46

⁸⁸ *ibid* para 5.33

⁸⁹ *ibid* para 5.44

⁹⁰ *ibid* para 5.46

⁹¹ *ibid* paras 5.145-5.146

⁹² *ibid* para 5.85

⁹³ *ibid* para 5.101

⁹⁴ *ibid* para 5.107

interrogation techniques were contained within a draft of the Manual of the Law of Armed Conflict.⁹⁵ This was seen to be problematic as the manual 'was not, and did not purport to be, operational guidance for commanders on the ground.'⁹⁶ The lack of knowledge of the 1997 Policy also affected a Human Intelligence Directive issued in the lead up to the Iraq War as the Inquiry found that one of the individuals responsible for drafting the Directive, Major S062, would have drafted the Directive differently had they been aware of the 1997 policy.⁹⁷

c. Responsibility for the Failure to Implement Adequate Doctrine

In the conclusions to Part V of the Baha Mousa Inquiry, which addressed the development of doctrine from the 1997 policy review to the beginning of the armed conflict in Iraq, it was stated that:⁹⁸

"In this Part of the Report... I have made some limited comments on the part played by some individuals in the lost doctrine saga. Save for those comments, in my view, it is unnecessary and inappropriate to blame or apportion blame to any individuals. It would also, in my opinion, be unfair to do so. The MoD has conceded that there were corporate failures... As I have endeavoured to explain, the failings arose over a lengthy period of time and involved a combination of failings and missed opportunities, some more serious than others. In the circumstances, in my judgment, the only fair conclusion is that the position reached at the outset of Op Telic... resulted from a series of corporate failings and missed opportunities."⁹⁹

These findings appear to be reasonable, since the doctrine which failed to highlight the fact that prohibited techniques were banned was developed over the course of 30 years and involved numerous people who were not necessarily

⁹⁵ *ibid* para 5.149

⁹⁶ *ibid*

⁹⁷ *ibid* para 7.144

⁹⁸ *ibid* Part V Ch 6

⁹⁹ *Ibid* para 5.151

aware of the work which was done in the past (and any potential shortcomings in that work). Additionally, the passage of time would seemingly make it impossible to establish any chain of causation between a failure to properly establish doctrine banning the use of the five techniques with actions committed in Iraq.

However, the failure to attribute responsibility to individuals may raise questions about whether the Baha Mousa Inquiry Report can be a means through which the United Kingdom can argue that it has conducted an investigation which satisfies the principle of complementarity, since it is stated in the Istanbul Protocol that one of the purposes of a torture investigation is the ‘establishment and acknowledgement of individual and State responsibility’.¹⁰⁰

The findings of the Baha Mousa Inquiry Report in relation to the loss of doctrine were criticised by the academic Andrew Williams who stated that ‘it provided a blanket defence to *any* government or military official involved in the use of such illegal practices – all could point to the “lost doctrine” that Gage held was unattributable.’¹⁰¹ However, in their final Report on the Preliminary Examination into the UK, the OTP noted that there ‘is a reasonable basis to believe’ that war crimes were committed in the events leading up to the death of Baha Mousa,¹⁰² and that:

“even if doctrinal shortcomings may have contributed to the process of unlawful ‘conditioning’ of detainees, as the Baha Mousa Inquiry stressed, nothing could have excused or mitigated the serious and gratuitous violence inflicted on detainees such as Baha Mousa, who was kicked, punched and beaten to death.”¹⁰³

¹⁰⁰ Office of the United Nations High Commissioner for Human Rights ‘Istanbul Protocol Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 78

¹⁰¹ Andrew Williams, ‘The Iraq Abuse Allegations and the Limits of UK Law’ [2018] Public Law 461, 466

¹⁰² OTP Final Report (n 1) paras 95-97

¹⁰³ *ibid* para 143

The Baha Mousa Inquiry Report found that there were numerous failings in training that may have served to increase such risks. For example, in relation to teaching on the Law of Armed Conflict, training materials ‘did not specifically mention the prohibition on the five techniques and did not provide any detailed guidance on prisoner handling and the treatment of civilian detainees’.¹⁰⁴ Additionally, teaching was found to largely rely on showing a video produced in 1986,¹⁰⁵ which did not address themes relevant to modern conflicts.¹⁰⁶ Whilst the Report highlights that the training did emphasise the requirement that people had to be treated ‘humanely’,¹⁰⁷ some soldiers nonetheless were under the impression that the use of hooding and stress positions could be justified.¹⁰⁸ Furthermore, the inquiry stated that failings in pre-deployment training ‘demonstrate the fault lines in policy and doctrine’,¹⁰⁹ which ‘stem from, and are examples of, the consequences of the loss of corporate memory of the Heath Statement and the 1972 Directive’.¹¹⁰

In relation to this, the House of Commons Defence Sub-Committee stated that:

“The admission that training material for interrogations contained information which could have placed service personnel outside of domestic or international law represents a failing of the highest order. We expect the MoD to confirm that no cases under consideration by IHAT are based on the actions of individuals who were following that flawed guidance. If there are, we ask the MoD to set out how it will support individuals who are subject to claims arising from actions which their training advised was lawful.”¹¹¹

Whether the findings of the Baha Mousa Report did serve to provide such a blanket defence, as suggested by Williams, is unclear, however. For example,

¹⁰⁴ Baha Mousa Inquiry Report Volume II (n 19) para 6.66

¹⁰⁵ *ibid* paras 6.21-6.23

¹⁰⁶ *ibid* para 6.44

¹⁰⁷ *ibid* para 6.46

¹⁰⁸ *ibid* paras 6.50-6.52.

¹⁰⁹ *ibid* para 6.501

¹¹⁰ *ibid*

¹¹¹ House of Commons Defence Committee, *Who guards the guardians? MoD support for former and serving personnel* (2016-2017, HC 109), para 86

in his statement following the publication of the Baha Mousa Report, the Defence Secretary stated the following:

“There is no place in our armed forces for the mistreatment of detainees, and there is no place for the mistreatment of detainees, and there is no place for a perverted sense of loyalty that turns a blind eye to wrongdoing or erects a wall of silence to cover it up. If any serviceman or woman, no matter the colour of uniform that they wear is found to have betrayed the values this country stands for and the standards that we hold dear, they will be held to account.”¹¹²

This statement does not appear to be consistent with the notion that UK personnel would escape liability in situations where they were responsible for potentially unlawful conduct. Calls for prosecutions of individuals for war crimes, based on the findings of the Baha Mousa Report, were also made by the non-governmental organisations Human Rights Watch,¹¹³ and Amnesty International.¹¹⁴ The OTP, in their Final Report on the UK Preliminary Examination stated that systemic issues identified in the Baha Mousa Report were ‘an aggravating factor’ in their assessment of alleged crimes committed by UK forces.¹¹⁵

However, it appears unlikely that a substantial number of prosecutions will take place in relation to alleged criminal conduct which has formed the basis of investigations conducted by the Iraq Historic Allegations Team (IHAT), as the OTP noted ‘one IHAT referral resulting in a guilty plea at a summary hearing for the beating of an Iraqi civilian in a UK armed forces vehicle’.¹¹⁶ In relation to

¹¹² HC Deb 8 September 2011 vol 532 col 573

¹¹³ Clive Baldwin, ‘Beyond Baha Mousa’ (*The Guardian*, 8 September 2011) <<https://www.theguardian.com/law/2011/sep/08/baha-mousa-inquiry-iraq-britain-law>> (Last accessed 15 May 2021)

¹¹⁴ Amnesty International UK, ‘Baha Mousa: ‘Those responsible must be held accountable for their actions’ (Amnesty International UK, 8 September 2011) <<https://www.amnesty.org.uk/press-releases/baha-mousa-those-responsible-must-be-held-held-accountable-their-actions>> (Last accessed 15 May 2021)

¹¹⁵ OTP Final Report (n 1) para 144

¹¹⁶ Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2018’ (International Criminal Court, 5 December 2018) <<https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>> (Last accessed 15 May 2021), para 201

IHAT's successor organisation, the Service Police Legacy Investigations (SPLI), Director of Service Prosecutions Andrew Cayley admitted in June 2020 that it was 'quite possible' that no prosecutions may be brought.¹¹⁷

Additionally, the UK government have introduced a Bill, the Overseas Operations (Service Personnel and Veterans) Bill, which if passed, will introduce a presumption against prosecutions taking place more than five years after the alleged conduct took place.¹¹⁸ This Bill may therefore reduce the chances of further prosecutions being pursued by the UK in relation to conduct which took place during the Iraq War. Whilst several offences are excluded from this presumption within the draft Bill, these are offences of a sexual nature, and therefore do not cover the full range of war being examined by the OTP.¹¹⁹ This Bill, and its potential effects on the UK's compliance with the principle of complementarity, will be discussed in further detail in Chapter Eight.

The matter of whether the Baha Mousa inquiry has actually inhibited the UK government's ability to pursue investigations and prosecutions is particularly important since the focus of the OTP's Preliminary Examination into the UK has been about the extent to which they have launched genuine investigations into instances of alleged abuse.¹²⁰ The potential lack of genuine investigations is a concern that has been drawn into recent focus as UK personnel are alleged to have taken steps to prevent individuals being held to account for potential war crimes,¹²¹ an allegation which has led to calls for an inquiry to be conducted into

¹¹⁷ Jonathan Beale, 'Iraq War: All but one war crimes claim against British soldiers dropped' (BBC News, 2 June 2020) <<https://www.bbc.co.uk/news/uk-52885615>> (Last accessed 15 May 2021)

¹¹⁸ Overseas Operations (Service Personnel and Veterans) HC Bill (2019-21) [117] cls 1-4

¹¹⁹ For the crimes excluded from the presumption against prosecution, see *ibid* cls 6(3)-(4) and sch 1 pts 1-2. For the crimes the OTP has determined that UK forces are alleged to have committed, see OTP Final Report (n 1) para 71

¹²⁰ Office of the Prosecutor, 'Report on Preliminary Examinations 2019' (International Criminal Court, 5 December 2019) <<https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>> (Last accessed 15 May 2021) para 169

¹²¹ Insight, 'Revealed: the evidence of war crimes ministers tried to bury' (*The Sunday Times*, 17 November 2019) <<https://www.thetimes.co.uk/past-six-days/2019-11-17/news/revealed-the-evidence-of-war-crimes-ministers-tried-to-bury-6x2fb63ts>> (Last accessed 15 May 2021)

the conduct of UK personnel.¹²² Furthermore, the analysis to be conducted below will demonstrate some of the shortcomings of the Baha Mousa Report.

2. Operation Telic 1 Practices

This section will discuss two attempts made to ban the use of hooding during Operation Telic 1. These are the ban on hooding imposed by the General Officer Commanding 1 (UK) Division during Operation Telic 1, Major General Robin Brims, in April 2003 and attempts to reinforce and extend the ban on hooding made by 1 (UK) Division Legal Advisor, Lieutenant Colonel Nicholas Mercer in May 2003. Whilst these bans on the use of hooding do not directly touch on the subject of the inquiry, the death of Baha Mousa, they do serve to highlight the operational difficulties which existed in trying to ban the practice of hooding in the absence of doctrine and training which specifically highlighted the prohibited nature of these techniques. Furthermore, the discussion of the Brims ban on hooding will assess the extent to which the Baha Mousa Report demonstrates the potential liability of senior UK officials for war crimes under the principle of command responsibility.

a. The Brims Ban on Hooding

i. The Factual Circumstances Surrounding the Ban

On what that the Baha Mousa Inquiry determined to be the 28th of March 2003, Major General Robin Brims visited the Prisoner of War handling facility located near the Iraqi town Um Qasr,¹²³ so that, as stated in his inquiry statement, he could 'have a look at the situation on the ground and ensure that things were

¹²² Insight, 'Army 'covered up torture and child murder' in the Middle East' (*The Sunday Times*, 17 November 2019) <<https://www.thetimes.co.uk/article/army-covered-up-torture-and-child-murder-bfdc5rsmw>> (Last accessed 15 May 2021)

¹²³ Baha Mousa Inquiry Report Volume II (n 19) para 8.54

running properly'.¹²⁴ During this time, Brims saw an individual 'hooded such that he could not see where he was going',¹²⁵ and he stated that:

"My immediate concern was that the hooding did not fit the type of operation we were doing. As my directive 1 had indicated, treating Iraqis decently and humanely (and being seen to do so) was of crucial importance. I felt that hooding at the POW Handling Facility was inconsistent with this approach and sent the wrong message to the Iraqi people."¹²⁶

Brims issued an order banning the use even though he was aware that 1 (UK) Division Legal Advisor Nicholas Mercer and National Contingency Command Legal Advisors had different opinions on whether the use of hooding was legal.¹²⁷ Mercer, after visiting the Joint Forward Interrogation Team (JFIT) and witnessing individuals hooded and in stress positions,¹²⁸ was of the view that such techniques were contrary to international law.¹²⁹ National Contingency Command legal advisors were of the opinion that the use of hooding could be justified for security reasons.¹³⁰

In relation to how the ban was issued, Brims stated, 'I told my CoS Colonel Marriott to relay this order, I do not know how or when he did so'.¹³¹ It was however stated that Brims was of the belief that Marriott would distribute the order by whatever means was required.¹³² The Baha Mousa Inquiry Report

¹²⁴ The Baha Mousa Public Inquiry, 'Witness Statement of Lieutenant General Robin Brims' (5th March 2010)
<https://webarchive.nationalarchives.gov.uk/20120215205253/http://www.bahamousainquiry.org/g/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_100610/bmi07382.pdf>
(Last accessed 15 May 2021), para 45

¹²⁵ *ibid* para 46

¹²⁶ *ibid* para 48

¹²⁷ Baha Mousa Inquiry Report Volume II (n 19) para 8.267

¹²⁸ *ibid* para 8.62

¹²⁹ *ibid* para 8.63

¹³⁰ In relation to the opinion of Major Gavin Davies, see *ibid* paras 8.213-8.216; in relation to the opinion of Captain Neil Brown, see *ibid* para 8.218; in relation to the opinion of Lieutenant Colonel Ewan Duncan, see para 8.240; and in relation to the opinion of Lieutenant Colonel Clapham, see para 8.248

¹³¹ Brims Witness Statement (n 124) para 50

¹³² Baha Mousa Inquiry Report Volume II (n 19) para 8.269

stated that the order was issued between the 1st and 3rd of April 2003.¹³³ The Inquiry Report also notes that the order was most likely given orally.¹³⁴ This resulted in a situation whereby the Deputy Chief of Staff for 1 (UK) Division was unaware of the order having been issued.¹³⁵ The Brigade Commander of 7 Armoured Brigade, Brigadier Graham Binns,¹³⁶ and his successor Brigadier Adrian Bradshaw were also unaware of the order banning hooding.¹³⁷

Brims stated that at the time the order was made, hooding was not a major priority as there were multiple issues that had to be dealt with in the context of an ongoing armed conflict.¹³⁸ He confirmed this thinking in oral evidence to the inquiry.¹³⁹ Brims was, however, 'not aware at the time that some soldiers might have viewed hooding prisoners at the point of capture as a standard operating procedure',¹⁴⁰ and the 1 (UK) Division Chief of Staff was similarly unaware that hoods were being used as a matter of course by some troops.¹⁴¹ The inquiry did, however, note that the extent to which hooding was viewed as standard practice varied widely from individuals believing it was indeed standard practice to individuals not being aware of the use of hooding at all.¹⁴²

However, the Report clearly demonstrates that hooding continued to be used on at least some basis after Brims' order was issued.¹⁴³ It is not clear though whether any reports on the continued use of hooding actually reached Brims. S002, for example, stated that he reported the continued use of hooding arriving at the Prisoner of War Handling Facility to the 1 (UK) Division Legal Advisor, Lieutenant Colonel Nicholas Mercer, and to the 1 (UK) Division Chief of Staff, Colonel Patrick Marriott.¹⁴⁴ The Report stated that Chief of Staff Marriott and Legal Advisor Mercer were unaware of the continued use of hooding at the

¹³³ *ibid* para 8.271

¹³⁴ *ibid* 8.268-8.278

¹³⁵ *ibid* para 8.280

¹³⁶ *ibid* para 8.282

¹³⁷ *ibid* 8.286

¹³⁸ Brims witness statement (n 124) para 50; *ibid* para 8.266

¹³⁹ Baha Mousa Inquiry Report Volume II (n 19) para 8.268

¹⁴⁰ *ibid* para 8.267

¹⁴¹ *ibid* para 8.274

¹⁴² *ibid* para 8.493

¹⁴³ *ibid* Pt VIII Ch 7 generally

¹⁴⁴ *ibid* paras 8.330-8.332

JFIT,¹⁴⁵ and concluded, 'I think it unlikely that S002 reported this up to either Marriott or Mercer'.¹⁴⁶ Additionally, at the time of issuing the Fragmentary Order which will be discussed in the next section, Mercer was of the belief that the Brims hooding ban had been distributed effectively.¹⁴⁷

This is of significance since, prior to the hooding ban being issued, a disagreement between Legal Advisor Nicholas Mercer and Senior Intelligence Officer S002, had resulted in the legality of the policy of hooding being referred up the Chain of Command to National Contingency Command.¹⁴⁸ Following a visit to the JFIT where he saw detainees hooded and in stress positions,¹⁴⁹ Mercer argued in a memo to Brims that the use such techniques was contrary to international law.¹⁵⁰ S002, in response, however defended the use of hooding for security purposes.¹⁵¹ Additionally, a complaint had been made by the International Committee of the Red Cross in relation to the use of hooding at the JFIT to National Contingency Command Policy Advisor S034 and through other means.¹⁵² S002 was informed of this complaint by Marriott,¹⁵³ and banned the use of double hooding and plastic hoods at this point, prior to the Brims ban.¹⁵⁴

Furthermore, a recording of prisoners being hooded during an operation conducted on 4 April 2003 by the Royal Regiment of Fusiliers was broadcast on UK news on 5 April 2003.¹⁵⁵ Whilst the inquiry did not decide to comment on the specifics of the operation,¹⁵⁶ it did state that it was not certain that Brims' order was circulated to the Fusiliers by the time the operation took place.¹⁵⁷ The Report did, however, note that 'the fact that there was a broadcast of British prisoners hooded by British soldiers after Brims' oral order banning hooding

¹⁴⁵ *ibid* paras 8.332-8.333

¹⁴⁶ *ibid* para 8.334

¹⁴⁷ *ibid* para 9.33

¹⁴⁸ *ibid* para 8.177

¹⁴⁹ *ibid* para 8.62

¹⁵⁰ *ibid* para 8.63

¹⁵¹ *ibid* paras 8.162-8.163

¹⁵² *ibid* para 8.185-8.190

¹⁵³ *ibid* para 8.202-8.204

¹⁵⁴ *ibid* para 8.206

¹⁵⁵ *ibid* para 8.338-8.339

¹⁵⁶ *ibid* para 8.340

¹⁵⁷ *ibid*

ought to have registered as a sign that the order may not have been successfully communicated'.¹⁵⁸ The Report additionally stated, 'this was a missed opportunity for the MoD and the deployed forces to have noticed that there may have been shortcomings in the communication of the ban on hooding'.¹⁵⁹ It is additionally clear that some soldiers who would go on to deploy to Iraq did see the footage.¹⁶⁰

In relation to the wider use of hooding after Brims issued his order, the Report does not examine exactly how widespread the practice of hooding was at this point, stating:

"I did not consider it necessary or proportionate to investigate in detail the extent to which hooding may have continued in Op Telic 1 after the orders of Burridge and Brims. To do so fully would have involved taking evidence from many Op Telic 1 Battlegroups and would have been very far removed from the events at the heart of this Inquiry."¹⁶¹

It is then stated, 'I am not able to make any findings as to quite how widespread the practice of hooding was following the bans by Burridge and Brims'.¹⁶² This has the potential to impact the extent to which the UK can argue the Baha Mousa Inquiry Report demonstrates that it has complied with the principle of complementarity. This is because in order to know the extent to which the actions taken by Brims to ban hooding were appropriate, or whether senior 1 (UK) Division commanders should have had knowledge of potential international crimes continuing to be committed, it would appear necessary to know how widespread the practice of hooding actually was.

This is especially the case when, as is about to be discussed, liability under the principle of command responsibility may arise under the Rome Statute where a commander 'failed to take all necessary and reasonable measures within his or

¹⁵⁸ *ibid* 8.341

¹⁵⁹ *ibid*

¹⁶⁰ *ibid* para 8.349

¹⁶¹ *ibid* para 8.316

¹⁶² *ibid* para 8.317

her power to prevent or repress' criminal conduct.¹⁶³ Additionally, a discussion of the extent to which the practice of hooding was actually used would serve to show the full extent that the lack of policy prohibiting the five techniques, discussed in the previous section, actually had on live operations.

ii. The Potential Application of the Principle of Command Responsibility

Brims stated that the failure for his order to be communicated widely was ultimately something that he was responsible for.¹⁶⁴ The question that is of relevance, however, is whether from the evidence provided, it could be argued that Brims could be held responsible for any alleged war crimes resulting from the use of hooding by individuals within those Brigades and Battlegroups under the command of 1 (UK) Division. After setting out the principle of command responsibility as defined in Article 28 of the Rome Statute,¹⁶⁵ this section will discuss whether the steps taken to ban the use of hooding were appropriate in the circumstances, whether a relationship of effective control existed between 1 (UK) Division commanders and the individuals responsible for the perpetration of alleged crimes, and the level of knowledge of 1 (UK) Division commanders that international crimes were in fact taking place. This is important since, in their Joint Communication to the OTP, the European Center for Constitutional and Human Rights (ECCHR) and Public Interest Lawyers (PIL) state that an investigation into military commanders should be conducted to determine whether they can be held responsible for international crimes under the principle of command responsibility.¹⁶⁶

¹⁶³ Rome Statute (n 9) Article 28(a)(ii)

¹⁶⁴ Baha Mousa Inquiry Report Volume II (n 19) para 8.268

¹⁶⁵ Rome Statute (n 9) Article 28

¹⁶⁶ European Center for Constitutional and Human Rights and Public Interest Lawyers, 'Communication to the Office of the Prosecutor of the International Criminal Court: The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008' (European Center for Constitutional and Human Rights, 10 January 2014)

<https://www.ecchr.eu/fileadmin/Juristische_Dokumente/January_2014_Communication_by_ECCHR_and_PIL_to_ICC_OTP_re_Iraq_UK_public_version_.pdf> (Last accessed 15 May 2021), 186

It should be noted that in their Final Report into the UK Preliminary Examination, the OTP argued that:

“a command responsibility case at the ICC could not base itself on the widespread practice of the use of hooding or other prohibited techniques, but would need to concentrate on a smaller sub-set of incidents where such conduct was carried out in a manner that resulted in cruel or inhuman treatment, and draw relevant inferences from a pattern of such incidents with respect to supervisory failures.”¹⁶⁷

The discussion to be conducted below will therefore serve to demonstrate whether the Baha Mousa Report allows for such an assessment to be made.

Article 28 of the Rome Statute states the following:

- “a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
- i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”¹⁶⁸

¹⁶⁷ OTP Final Report (n 1) para 369

¹⁶⁸ *ibid*

Necessary and Reasonable Measures

In relation to the matter of whether 1 (UK) Division commanders took ‘all necessary and reasonable measures’,¹⁶⁹ Brims did take steps to prevent crimes from taking place, as when he saw that hooding was being used, he decided to issue a ban on hooding. The *Bemba* Trial Chamber judgment confirms that one measure that can be taken in order to comply with Article 28(2)(a)(ii) of the Rome Statute is ‘issuing orders specifically meant to prevent the crimes, as opposed to merely issuing routine orders’.¹⁷⁰ In the case of the Brims ban, as has already been shown, this was issued as a result of specific practice he had witnessed, so would not appear to fall within the confines of a routine order. The Baha Mousa Report does provide details of other orders issued which appear to fall within the context of routine orders. For example, prior to deployment, Brims issued a Directive which stated that UK troops had to maintain discipline and professionalism in the course of Operation Telic 1,¹⁷¹ which was praised by the Inquiry as it was stated:

“I respectfully commend Brims for the way in which he sought to communicate his intent for 1 (UK) Div Operations. His intent set out the right blend of the determined use of force in what was a war but tempered by the need to avoid triumphalism, to bear in mind the needs of Phase IV, to restore and foster Iraqi dignity and to insist upon the highest standards of self discipline.”¹⁷²

Additionally, the Report highlights that in the lead up to deployment, 1 (UK) Division issued multiple directives which required that individuals who were detained by UK forces had to be treated in a manner which is consistent with international humanitarian law.¹⁷³ Therefore, by issuing an order which specifically dealt with the use of a single technique, it would appear that Brims

¹⁶⁹ *ibid* Article 28(a)(ii)

¹⁷⁰ *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016), para 204

¹⁷¹ Baha Mousa Inquiry Report Volume II (n 19) paras 7.29-7.31

¹⁷² *ibid* para 7.202

¹⁷³ For example, *ibid* para 7.50 and para 7.66

went beyond what was included within routine orders to address a specific practice.

As has already been mentioned, the ban was poorly disseminated, and it therefore has to be asked whether Brims did take 'all necessary and reasonable measures to prevent' crimes taking place as is required under Article 28(a)(ii) of the Rome Statute.¹⁷⁴ One possible means to suggest that he did not take all the actions that he could have done can be seen in how the Brims hooding ban was issued. As has already been stated, the inquiry found that the ban was likely issued orally.¹⁷⁵ The Baha Mousa Inquiry Report is critical of this means of disseminating an order, stating, 'it would have been far better had Brims' order prohibiting hooding been followed up by a written order'.¹⁷⁶ However, the Report states:

"In assessing whether Brims' oral order to ban hooding should have been issued in writing I am very conscious of the beguiling precision of hindsight. If Brims' order had been reduced to written form it is of course possible to speculate that its effect of banning hooding for all purposes might have been disseminated to the widest extent and down to each individual soldier on the ground. It is also possible that the communication difficulties experienced in theatre and the untold number of other complex issues and tasks simultaneously being faced by all levels of the Armed Forces during the combat operations would have otherwise stalled or hindered the message Brims' order conveyed."¹⁷⁷

To rephrase the findings of the report in a more succinct matter, it is not clear whether an additional means of distributing the order would have actually improved the extent to which the order was received and understood. Additionally, it is stated that the use of hooding being seen as a standard practice was 'with hindsight'.¹⁷⁸ As is stated in the *Bemba* Appeal judgment,

¹⁷⁴ Rome Statute (n 9) Article 28(a)(ii)

¹⁷⁵ Baha Mousa Inquiry Volume II (n 19) 8.268-8.278

¹⁷⁶ *ibid* para 8.493

¹⁷⁷ *ibid* para 8.291

¹⁷⁸ *ibid* para 8.493

‘whether a commander took all “necessary and reasonable measures” must be based on considerations of what crimes the commander knew or should have known about and at what point in time.’¹⁷⁹ The judgment then goes on to state:

“There is a very real risk, to be avoided in adjudication, of evaluating what a commander should have done with the benefit of hindsight. Simply juxtaposing the fact that certain crimes were committed by the subordinates of a commander with a list of measures which the commander could hypothetically have taken does not, in and of itself, show that the commander acted unreasonably at the time... Abstract findings about what a commander might theoretically have done are unhelpful and problematic, not least because they are very difficult to disprove.”¹⁸⁰

Whilst it would be for a court to determine any liability in relation to crimes associated with the use of hooding which were committed as a result of Brims’ and Marriott’s failure to effectively communicate that hooding had been banned, it appears that this would largely depend on the extent to which high-ranking personnel were actually aware of the continued use of hooding at the time. In respect of attributing blame for the failure of the order prohibiting hooding, the Baha Mousa Inquiry states that:

“Given their knowledge at the time, I find that the communication of Brims’ hooding ban is something in respect of which 1 (UK) Div, and Marriott as the Chief of Staff could have performed better, rather than being a matter that is deserving of personal criticism.”¹⁸¹

A final factor to consider when assessing the extent to which the Brims hooding order constituted the pursuit of necessary and reasonable measures is the fate of a similar order made at the time of Brims’ order. The inquiry found that a ban

¹⁷⁹ *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/08 A (8 June 2018), para 168

¹⁸⁰ *ibid* para 170

¹⁸¹ Baha Mousa Inquiry Report Volume II (n 19) para 8.493

on hooding was also issued by the National Contingent Commander, Air Marshal Brian Burridge, who is above Brims in the chain of command.¹⁸² This came after Burridge was made aware of the complaint of the ICRC regarding the use of hooding.¹⁸³ Additionally, the Report highlights that the ban was issued even though Burridge was of the opinion that the use of hooding was 'a legal grey area'.¹⁸⁴ However, the Report notes that 'some senior staff officers in the NCHQ were clearly unaware that their commander, Burridge, had banned hooding.'¹⁸⁵ This included Major Gavin Davies, Staff Officer Level 2 in NCHQ Legal, who was unaware of the actions taken by either Brims or Burridge in relation to a ban on hooding even though he attended a meeting with the International Committee at the Red Cross to discuss complaints about the use of hoods,¹⁸⁶ in which it was stated that whilst it was believed that hoods could be used for security purposes, the UK had decided as a matter of policy to stop the use of hoods.¹⁸⁷

The fact that a ban imposed by a level in the chain of command higher up than that of 1 (UK) Division fell on similarly deaf ears as the ban introduced by 1 (UK) Division may serve to suggest that the action undertaken by Brims and Marriott to introduce their ban was not unreasonable action to take, and therefore, it would seem unfair to suggest that they should be held accountable for the actions of their subordinates based on the principle of command responsibility. However, as with the other elements required to establish liability under the principle of command responsibility, this is ultimately a matter which would have to be decided by a prosecutor deciding to whether to pursue a case or a court determining the culpability of a defendant.

¹⁸² *ibid* para 8.252. For a 'Op Telic 1 Simplified Chain of Command Diagram', see Baha Mousa Inquiry Report Volume I (n 6) 39

¹⁸³ Baha Mousa Inquiry Report Volume II (n 19) paras 8.252 and 8.254

¹⁸⁴ *ibid* para 8.255

¹⁸⁵ *ibid* para 8.492

¹⁸⁶ *ibid* para 8.293

¹⁸⁷ *ibid* para 8.302

Effective Command and Control

The second element of the principle of command responsibility which will be discussed in this section is the relationship between Brims and those soldiers who may have committed war crimes through the continued use of hooding. Under Article 28(a) of the Rome Statute, subordinates are required to be under a commander's 'effective command and control, or effective authority and control as the case may be'.¹⁸⁸ In relation to the distinction between the two types of relationship stated in Article 28(a), the *Bemba* Confirmation Decision, the Pre-Trial Chamber stated that 'the degree of "control" required under both expressions is the same',¹⁸⁹ a position which was endorsed by the Trial Chamber.¹⁹⁰ The definition of effective control cited by the Pre-Trial Chamber and Trial Chamber in *Bemba*,¹⁹¹ comes from the International Criminal Tribunal for the former Yugoslavia (ICTY) case of *Delalic*, in which it was stated that a superior has to have 'the material ability to prevent and punish' crimes.¹⁹² As stated by the ICTY in the *Blaškić* appeal, 'the indicators of effective control are more a matter of evidence than of substantive law',¹⁹³ a position agreed with by the Trial Chamber in *Bemba*,¹⁹⁴ who provided a list of 10 factors which 'may indicate the existence of "effective control"' based on the practice of the ad-hoc tribunals.¹⁹⁵

Of these factors, one appears to be crucial in determining whether a relationship of effective control existed in relation to the Brims hooding ban, the commander's 'capacity to ensure compliance with orders including consideration of whether the orders were actually followed'.¹⁹⁶ Additionally, as stated by the Trial Chamber in *Bemba*, 'disregard or non-compliance with

¹⁸⁸ Rome Statute (n 9) Article 28(a)

¹⁸⁹ *Prosecutor v Jean-Pierre Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009), para 413

¹⁹⁰ *Bemba* Trial Chamber Judgment (n 170) para 181

¹⁹¹ *Bemba* Confirmation Decision (n 189) paras 414-15; *ibid* para 188

¹⁹² *Prosecutor v Delalić* (Judgement) IT-96-21-T (16 November 1998), para 378; *Prosecutor v Delalić* (Judgement) IT-96-21-A (20 February 2001), para 256

¹⁹³ *Prosecutor v Blaškić* (Judgment) IT-95-14-A (29 July 2004), para 69

¹⁹⁴ *Bemba* Trial Judgment (n 170) para 188

¹⁹⁵ *ibid*

¹⁹⁶ *ibid*

orders' is indicative of an absence of effective control.¹⁹⁷ In this case, as has already been discussed, it is clear that a problem existed with the dissemination of orders from Brims, to brigade level, let alone battlegroup level. For example, successive commanders of 7 Armoured Brigade, who fell under the Command of 1 (UK) Division were unaware of the order banning the use of hooding.¹⁹⁸ Additionally, in relation to the Battlegroup 1 Black Watch, who were under the command of 7 Armoured Brigade (and in turn 1 (UK) Division), the inquiry found that they hooded people during Operation Telic 1,¹⁹⁹ with the commanding officer even stating that hooding was used as a matter of course.²⁰⁰ The Inquiry stated that 'It was clear that Brims' oral order prohibiting hooding in early April 2003 did not reach 1 BW.'²⁰¹

It may be the case that the failure to disseminate the ban on hooding reflects a lack of effective control on the part of Brims over soldiers on the ground, since the order did not always reach troops on the ground. However, it is also possible that dissemination difficulties may be reflective of the fact that senior 1 (UK) Division Commanders did not take all necessary and reasonable measures to ensure that their order was communicated effectively, or that such failures were an unfortunate consequence of the difficulties associated with an ongoing armed conflict. In relation to this final point, the inquiry refused to rule out the possibility that a written order would not have led to wider dissemination, stating:

"It is also possible that the communication difficulties experienced in theatre and the untold number of other complex issues and tasks simultaneously being faced by all levels of the Armed Forces during the combat operations would have otherwise stalled or hindered the message Brims' order conveyed."²⁰²

¹⁹⁷ *ibid* para 190; in the *Strugar* Appeal Judgment, the ICTY Appeal Chamber stated that 'evidence of prior instances of indiscipline and of non-compliance with orders would be clearly relevant to an assessment of whether Strugar had effective control over his subordinates': *Prosecutor v Strugar* (Judgement) IT-01-42-A (17 July 2008), para 257

¹⁹⁸ See Baha Mousa Inquiry Report Volume II (n 19) paras 8.282 and 8.286

¹⁹⁹ Baha Mousa Inquiry Report Volume III (n 7) para 10.113

²⁰⁰ *ibid*

²⁰¹ *ibid* para 10.159

²⁰² Baha Mousa Inquiry Report Volume II (n 19) para 8.291

Difficulties in relation to the dissemination of a written order will be discussed in the next section's discussion of orders issued by the 1 (UK) Division Legal Advisor Nicholas Mercer to expand the ban on hooding. Ultimately, however, which of these alternatives is applicable is a matter which would need to be determined with reference to the wider context of practice within Operation Telic 1.

Additionally, the possibility that a relationship of effective control cannot be established in a situation such as this may actually be reflective of the difficulty to apply the principle of command responsibility in general. Judges van den Wyngaert and Morrison stated in their separate opinion in the *Bemba* appeal that:

“It is important not to get into a mind-set that gives priority to the desire to hold responsible those in high leadership positions and to always ascribe to them the highest levels of moral and legal culpability. Although article 28 of the Statute can very well be applied to senior commanders, it is not always the right tool to link them directly to the conduct of the physical perpetrators.”²⁰³

Knowledge of Crimes

Should it be possible to establish a relationship of effective control, it is necessary to establish that the commander ‘knew or, owing to the circumstances at the time, should have known that forces were committing or about to commit such crimes’.²⁰⁴ In *Bemba*, the Trial Chamber stated that ‘actual knowledge on the part of a commander cannot be presumed. Rather, it must be established either by direct or indirect (circumstantial) evidence.’²⁰⁵ In relation to the latter standard, the Pre-Trial Chamber in *Bemba* stated that:

²⁰³ *Prosecutor v Jean-Pierre Bemba Gombo* (Separate opinion: Judge Christine Van den Wyngaert and Judge Howard Morrison) ICC-01/05-01/08-3636-Anx2 (8 June 2018), para 35

²⁰⁴ Rome Statute (n 9) Article 28(a)

²⁰⁵ *Bemba* Trial Judgment (n 170) para 191

“The factors... in relation to the determination of actual knowledge are also relevant in the Chamber’s final assessment of whether a superior “should have known” of the commission of the crimes or the risk of their occurrence. In this respect, the suspect may be considered to have known, if *inter alia*, and depending on the circumstances of each case: (i) he had general information to put him on notice of crimes committed by subordinates or of the possibility of the occurrence of the unlawful acts; and (ii) such available information was sufficient to justify further inquiry or investigation.”²⁰⁶

Whilst the Baha Mousa Report does highlight that Brims was aware of the use of hoods on at least one occasion since witnessing a prisoner being hooded is what prompted him to issue the ban on hooding in the first place, it is uncertain that Brims had actual knowledge of crimes taking place. Brims and his Chief of Staff, Marriott, stated that they were unaware of the use of hooding being a standard practice for some UK personnel.²⁰⁷ Additionally, the Report stated that Legal Advisor Mercer and Chief of Staff Marriott were unaware of the continuing practice of hooding in the JFIT.²⁰⁸

Furthermore, Brims and his successor as General Officer Commanding 1 (UK) Division, Major General Peter Wall who took over in May 2003 after serving as Chief of Staff at the National Contingent Command, both stated they did not discuss the practice of hooding,²⁰⁹ which would unlikely appear to be consistent with Brims being aware of the ongoing use of hooding.

It is also unclear whether the Baha Mousa Report presents enough evidence to suggest that Brims had sufficient information to justify investigations into potential crimes that were either being committed or were about to be committed. As has already been shown, Sir William Gage stated that a wider

²⁰⁶ Bemba Confirmation Decision (n 189) para 434

²⁰⁷ Baha Mousa Inquiry Report Volume II (n 19) paras 8.267 and 8.274

²⁰⁸ *ibid* paras 8.332-8.333

²⁰⁹ Baha Mousa Inquiry Report Volume III (n 7) para 10.9

examination of the continued use of hooding after Brims' order was issued would have been outside the scope of the inquiry,²¹⁰ and was therefore unable to make any findings in regard to the continued use of hooding.²¹¹ However, in relation to the indicators stated by the Pre-Trial Chamber in *Bemba* to be relevant in determining knowledge for the purposes of command responsibility, such as 'the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved',²¹² more information regarding the continued use of hooding in the wider context of all forces under the command of 1 (UK) Division would be required in order to establish whether senior commanders within 1 (UK) Division, and indeed potentially above, should have been aware of the perpetration of international crimes.

It may be the case that the failure of the Baha Mousa Inquiry to investigate the wider use of hooding in 1 (UK) Division may undermine the effectiveness of the Inquiry's investigation of torture, since the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment state that one of the purposes of a torture investigation is 'clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families'.²¹³ Furthermore, this investigative gap may be indicative of a need, as suggested by the United Nations Committee against Torture, to establish 'a single, independent public inquiry to investigate allegations of torture and cruel, inhuman or degrading treatment or punishment in Iraq from 2003 to 2009',²¹⁴ as an examination of the full extent of hooding, and other techniques which may constitute an international crime, may only be possible through an investigative mechanism with wider terms of reference than the Baha Mousa Inquiry. The

²¹⁰ Baha Mousa Inquiry Report Volume II (n 19) para 8.316

²¹¹ *ibid* para 8.317

²¹² Bemba Confirmation Decision (n 189) para 431

²¹³ Istanbul Protocol (n 100) para 78

²¹⁴ United Nations Committee against Torture, 'Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, adopted by the Committee at its fiftieth session (6-31 May 2013)' UN Doc CAT/C/GBR/CO/5 (24 June 2013), para 16; United Nations Committee against Torture, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland' UN Doc CAT/C/GBR/CO/6 (7 June 2019), para 33

United Kingdom government has however rejected the notion of such an inquiry.²¹⁵

In relation to a potential investigation by the ICC, it may be necessary for the UK to demonstrate that other lines of inquiry, such as the Iraq Historical Allegations Team, have examined whether or not senior commanders are responsible for international crimes. This is a factor of relevance since in their 2018 Preliminary Examination Report, the OTP noted that ‘The information available indicates that the focus of the UK’s investigative and prosecutorial efforts regarding alleged crimes in Iraq has largely focused on low-level physical perpetrators and mid-level superiors’.²¹⁶ The OTP’s Final Report does, however, make clear that command responsibility has been a focus of SPLI investigative efforts.²¹⁷

b. Divisional and Brigade Level Fragmentary Orders Regarding Hooding and the Handover between Operation Telic 1 and Operation Telic 2

In May 2003, guidance written by the 1 (UK) Division Legal Advisor Nicholas Mercer was incorporated into Divisional Fragmentary Order (FRAGO) 152 and by 7 Armoured Brigade in their FRAGO 63.²¹⁸ This guidance stated that in the event that a unit had to detain a person for any reason that ‘the detained person should be treated with humanity and dignity at all times’,²¹⁹ and that ‘under no circumstances should their faces be covered as this might impair breathing’.²²⁰ Mercer’s evidence to the inquiry was that this guidance was intended to ensure that UK personnel would not be able to exploit any loopholes which may have

²¹⁵ United Nations Committee against Torture, ‘Information received from the United Kingdom of Great Britain and Northern Ireland on follow-up to the concluding observations’ (16 June 2014) UN Doc CAT/C/GBR/CO/5/Add.1, paras 6-9

²¹⁶ OTP 2018 Preliminary Examination Report (n 116) para 202

²¹⁷ OTP Final Report (n 1) para 191

²¹⁸ Baha Mousa Inquiry Report Volume II (n 19) paras 9.26-9.27

²¹⁹ 1 (UK) Division, Fragmentary Order 152 (30 May 2003), Enclosure 1 para 5, available at <https://webarchive.nationalarchives.gov.uk/20120215214434/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_160310/mod017061.pdf> (Last accessed 15 May 2021)

²²⁰ *ibid*

existed in Brims' previous ban on the use of hooding.²²¹ Whilst Sir William Gage does state that the ban on hooding could have been made more obvious,²²² it is also stated that 'any proper reading of Mercer's FRAGO 152 should have led the reader to conclude that hooding was indeed banned',²²³ and this is the manner in which it was understood by witnesses who testified on the matter at the inquiry.²²⁴ The Report chose not to fault Mercer for not stating more clearly that the use of hooding was prohibited,²²⁵ and indeed stated that he 'deserves some credit for ensuring that this order was issued'.²²⁶

However, the Inquiry Report does highlight that in the process of the handover between Operation Telic 1 and Operation Telic 2, the fact that hooding was prohibited, whether articulated by Brims or Mercer, was not something which received much attention. Indeed, the Inquiry Report states that at the divisional level, 'The general tenor of the evidence suggested that the topic of prisoner handling was for the most part not given a high priority by senior officers of each Division during the handover.'²²⁷ It is however noted that the 3 (UK) Division legal advisor Lieutenant Colonel Charles Barnett did know about both the Brims order banning hooding and FRAGO 152 following the handover process,²²⁸ though Sir William Gage states that this 'was raised as one of a number of areas of concern rather than as the most important legal issue in theatre'.²²⁹ The Report is also critical of the fact that 'no single branch appears to have regarded it as its responsibility to lead in matters of prisoner handling and detention',²³⁰ and that this 'contributed to the patchy knowledge of the ban on hooding in both 1 (UK) Div and 3 (UK) Div'.²³¹ This is something which is contrasted with modern practice where responsibility is assumed for such practices.²³²

²²¹ Baha Mousa Inquiry Volume II (n 19) paras 9.30-9.33

²²² *ibid* para 9.167

²²³ *ibid* para 9.37

²²⁴ *ibid*

²²⁵ *ibid* para 9.166

²²⁶ *ibid*

²²⁷ Baha Mousa Inquiry Report Volume III (n 7) para 10.51

²²⁸ *ibid* paras 10.44-10.45

²²⁹ *ibid* para 10.48

²³⁰ *ibid* para 10.56

²³¹ *ibid*

²³² *ibid*

The Report also notes that a similar pattern existed in relation to the handover process at the brigade level between 7 Armoured Brigade and 19 Mechanised Brigade whereby 'prisoner handling was seemingly a relatively low priority and little more was effected than the physical handing over of hard copies of past orders, or the location of those orders on the computer systems'.²³³ Additionally, the Report states that brigade level legal advisors were made aware of the prohibition of hooding by their predecessors at divisional or brigade level.²³⁴ At the battlegroup level, the Report does state that FRAGO 63 was received by at least one Battlegroup within 7 Armoured Brigade, the Joint Nuclear Biological Chemical Regiment,²³⁵ though the Report states that the orders from Brims and Burrige banning the use of hooding did not likely reach this level.²³⁶ In relation to the handover between 1 Black Watch and 1 Queen's Lancashire Regiment, the Report states that 'the handover did not succeed in effectively conveying to 1 QLR that hooding had been banned in theatre'.²³⁷ In relation to other battlegroups, it is stated that inquiry witnesses were not explicitly made aware of any ban on hooding during their handover process.²³⁸

As to how this handover knowledge effected the level of knowledge of troops deployed during Operation Telic 2, Sir William Gage states that soldiers who were deployed during Operation Telic 2 primarily fell into three categories of knowledge regarding the policy around hooding – they didn't know about the ban or the use of hooding at all, they knew about the ban but not the use of hooding, or they did not know about the ban but were aware of the continued use of hooding.²³⁹ However, Gage also states that in relation to those individuals who were aware of a ban on hooding, 'there was, I find, a misplaced confidence among those who knew of a ban on hooding, that this knowledge was widely shared among their colleagues'.²⁴⁰

²³³ *ibid* para 10.99(1)

²³⁴ *ibid* paras 10.93-10.95

²³⁵ *ibid* para 10.107

²³⁶ *ibid* para 10.109

²³⁷ *ibid* para 10.182

²³⁸ *ibid* para 10.198

²³⁹ *ibid* para 12.3

²⁴⁰ *ibid* para 12.175

It is clear that despite the efforts of Brims and Mercer that hooding continued to be used after their orders prohibiting their use were issued – the Report, for example highlights the use of hooding during Operation Telic 2, not only by members of 1 QLR in the events leading up to the death of Baha Mousa,²⁴¹ but also by other battlegroups.²⁴² The Mercer guidance included within FRAGO 152 is important because:

“Mercer’s guidance on the detention of civilians was the only written order disclosed to the inquiry which was issued before Baha Mousa’s death and which contained an apparent reference to the prohibition on hooding prisoners”.²⁴³

This shows how the failures highlighted by the Baha Mousa Inquiry Report served to have a cumulative effect. The failure to develop adequate military doctrine resulted in a situation whereby those responsible for developing policy prior to deployment were not aware of prohibited techniques, and that the prohibited nature of these techniques was not adequately communicated in training, and then when a ban was issued in theatre, those who were aware of a ban assumed that it had been distributed adequately.

3. The Liability of Ministers for the Conduct of Military Personnel in Iraq

In their Joint Communication to the OTP, the European Center for Constitutional and Human Rights (ECCHR) and Public Interest Lawyers (PIL) argue, based on the findings of the Baha Mousa Report, that, Geoffrey Hoon and Adam Ingram, as the then Secretary of State for Defence and Minister of State for the Armed Forces, respectively, can be held responsible for war crimes as civilian commanders under Article 28(b) of the Rome Statute.²⁴⁴

²⁴¹ See Baha Mousa Inquiry Report Volume I (n 6) Part II generally

²⁴² See Baha Mousa Inquiry Report Volume III (n 7) Part XII, Chapter 4

²⁴³ Baha Mousa Inquiry Report Volume III (n 7) para 9.165

²⁴⁴ ECCHR and PIL Joint Communication (n 166) 186-99

Despite the concerns raised by the ECCHR and PIL regarding the potential liability of government ministers for actions which took place in Iraq, there is no publicly available information which suggests that they are the focus of criminal investigations or prosecutions. This is the case even though the OTP has stated that ‘the UK authorities do not appear to have remained inactive in relation to broader allegations of systemic abuse or of military command or civilian superior responsibility’.²⁴⁵

4. Implementation of the Baha Mousa Report’s Recommendations

In relation to the OTP’s ongoing preliminary examination into the conduct of UK personnel in Iraq, Hansen states that:

“One particularly critical aspect of the complementarity assessment will be whether, and if so how, domestic processes are able to tackle ‘systemic issues’, understood to involve system failures such as poor supervision, lack of guidance and lack of training... To the extent the OTP concludes that there is a reasonable basis to believe that crimes within the jurisdiction of the court were committed on a large scale, the Office will expect domestic processes to address systemic issues for it to make a call that complementarity renders further steps by the Office unnecessary.”²⁴⁶

In order to assess the effectiveness of the Baha Mousa Inquiry as a means through which the United Kingdom may be able to demonstrate that it has complied with the principle of complementarity, it will be necessary to determine the extent to which the UK has addressed systemic failings following the publication of the Report.

²⁴⁵ OTP 2019 Preliminary Examination Report (n 120) para 168

²⁴⁶ Thomas Obel Hansen, ‘Accountability for British War Crimes in Iraq? Examining the Nexus Between International and National Justice Responses’ in Morten Bergsmo and Carsten Stahn (eds) *Quality Control in Preliminary Examination: Volume 1* (Torkel Opsahl Academic EPublisher 2018) 422

Whilst the Baha Mousa Report does note that that improvements had been made to address systemic faults within the armed forces during the eight years between the death of Baha Mousa and the Report being issued,²⁴⁷ and that work on further reforms was underway prior to the final report even being issued as a result of the inquiry,²⁴⁸ the Inquiry did still ultimately issue 73 recommendations for improvement within the MoD.²⁴⁹ As part of the government's response to the release of the Report, Secretary of State for Defence, Liam Fox stated the following:

“We are in no way complacent about the issues identified by Sir William, and I can inform the house that I am accepting in principle all his recommendations with one reservation. It is vital that we retain the techniques necessary to secure swiftly, in appropriate circumstances, the intelligence that can save lives. I am afraid that I cannot accept the recommendation that we institute a blanket ban, during tactical questioning, on the use of certain verbal and non-physical techniques.”²⁵⁰

As a part of the government's arguments in the *Ali Zaki Mousa (No. 2)* litigation, it was stated that work was ongoing in relation to the implementation of the recommendations of the Baha Mousa Report that had been accepted by the government,²⁵¹ and Leggatt J said of the recommendations ‘the great majority of these have now been implemented’.²⁵² In addition, in the Al Sweady Inquiry, Sir Thyne Forbes stated that he was ‘satisfied that the MoD had accepted and implemented those of Sir William Gage's recommendations that might have formed the subject of my own’,²⁵³ a position which affected more than a third of the recommendations made by the Baha Mousa Report.²⁵⁴

²⁴⁷ Baha Mousa Inquiry Report Volume III (n 7) para 16.2

²⁴⁸ *ibid* paras 16.10-16.13

²⁴⁹ *ibid* Part XVII generally

²⁵⁰ HC Deb 8 September 2011 vol 532 col 572

²⁵¹ *R (Ali Zaki Mousa and Others) v Secretary of State for Defence (No. 2)* [2013] EWHC 1412 (Admin) para 97

²⁵² *ibid* para 208

²⁵³ Sir Thyne Forbes, *The Report of the Al Sweady Inquiry: Volume I* (2014-2015, HC 818-I), para 1.158

²⁵⁴ Sir Thyne Forbes, *The Report of the Al Sweady Inquiry: Volume II* (2014-2015, HC 818-II), para 5.101

The one technique that was rejected by the government was that the use of the harsh technique in tactical questioning be banned.²⁵⁵ In *Hussein v Secretary of State for Defence*, the High Court defined the harsh approach in the following terms:

“The harsh technique included the following elements which could be deployed as the questioner considered necessary. The shouting could be as loud as possible. There could be what was described as uncontrolled fury, shouting with cold menace and then developing, the questioner’s voice and actions showing psychotic tendencies, and there could be personal abuse. Other techniques were described as cynical derision and malicious humiliation, involving personal attacks on the detainee’s physical and mental attitudes and capabilities. He could be taunted and goaded as an attack on his pride and ego and to make him feel insecure. Finally, he could be confused by high speed questioning, interrupting his answers, perhaps misquoting his replies.”²⁵⁶

Whilst the Baha Mousa Inquiry declined to make a determination on the lawfulness of the technique,²⁵⁷ the Report stated that ‘even if the harsh approach as currently taught is lawful, its risks if used in forward deployed areas outweigh the benefits of its use.’²⁵⁸ In *Hussein*, both Collins J in the High Court,²⁵⁹ and Lloyd Jones LJ in the Court of Appeal stated their agreement with Sir William Gage’s comments on the unacceptable nature of the harsh technique.²⁶⁰

The MoD replaced the harsh approach with a technique called the challenging approach in August 2011, with the Systemic Issues Working Group (SIWG) stating the new ‘approach makes clear that threats or insults are not to be

²⁵⁵ Baha Mousa Inquiry Report (n 6) Part XVII Recommendation 23; HC Deb 8 September 2011 vol 532 col 572

²⁵⁶ *Hussein v Secretary of State for Defence* [2013] EWHC 95 (Admin), para 7

²⁵⁷ Baha Mousa Inquiry Report Volume III (n 7) para 16.176

²⁵⁸ *ibid* para 16.200

²⁵⁹ *Hussein* High Court Judgment (n 256) para 8

²⁶⁰ *Hussein v Secretary of State for Defence* [2014] EWCA Civ 1087, para 57

used'.²⁶¹ Despite rejecting the recommendation that the harsh approach be banned in the context of tactical questioning, the Baha Mousa Report did still have an impact on the development of the challenging approach. For example, in *Hussein*, the High Court stated that the policy 'has been developed following Sir William Gage's report, has taken account of his recommendations and has sought to apply them so as to avoid the potential unlawfulness apparent in the 'harsh' approach'.²⁶² Additionally, the Court of Appeal stated that the Defence Secretary has taken into account Sir William Gage's recommendations by ensuring 'clear guidance is provided in training as to the proper limits of challenge direct',²⁶³ removed comparisons between the tactical questioner and a drill sergeant,²⁶⁴ that the title of the approach has been changed to avoid the impression that illegal behaviour is allowed under the approach,²⁶⁵ and that its use requires ministerial approval.²⁶⁶ The High Court and Court of Appeal in *Hussein* would ultimately determine that use of the challenging technique was lawful.²⁶⁷

The fact that the Baha Mousa Report had an effect on UK policy even in situations where the government had rejected recommendations shows how influential the Report was in relation to the UK's attempts to address systemic issues. The contribution of the Baha Mousa Report in addressing systemic issues is a developing theme, as for example, in their July 2014 Report, the SIWG stated that interrogation training had been redesigned following the recommendations of the Baha Mousa Inquiry.²⁶⁸ Furthermore, as has already

²⁶¹ Ministry of Defence, 'Systemic Issues Identified from Investigations into Military Operations Overseas: July 2014' (Ministry of Defence July 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/327180/Systemic_Issues_identified_from_investigations_into_military_operations_overseas.pdf> (Last accessed 15 May 2021) 3-4

²⁶² *Hussein* High Court Judgment (n 256) para 11

²⁶³ *Hussein* Court of Appeal Judgment (n 260) para 58

²⁶⁴ *ibid.* The Baha Mousa Report had stated in this respect: 'I am concerned that aspects of some drill sergeants' approach to berate, cajole and deride their drill squad may not be compliant with Article 17 of the Third Geneva Convention if used on CPERS': Baha Mousa Inquiry Volume III (n 7) para 16.202. The term CPERS refers to captured persons.

²⁶⁵ *Hussein* Court of Appeal Judgment (n 260) para 58

²⁶⁶ *ibid.*

²⁶⁷ *Hussein* High Court Judgment (n 256); *Hussein* Court of Appeal Judgment (n 260)

²⁶⁸ Ministry of Defence (n 261) 3. It was stated at 1 that the SIWG was created to contribute to 'a robust process for identifying, reviewing and correcting areas where its doctrine, policy and training have been insufficient to prevent practices or individual conduct that breach its obligations under international humanitarian law'.

been mentioned, in the context of the Al Sweady Report, the Baha Mousa Report made 28 recommendations which, in full or in part, ‘might have formed’ part of the recommendations at the conclusions of the Al Sweady Report.²⁶⁹

Finally, in 2012, Armed Forces Minister Nick Harvey announced that the Baha Mousa Inquiry Report would be examined as part of the Iraq Historic Allegations Team’s investigatory process ‘to assess whether more can be done to bring those responsible for the treatment of Baha Mousa to justice’.²⁷⁰ However, in the course of hearings in *Al-Saadoon* in 2017, Leggatt J was critical of delays by prosecuting authorities in deciding whether to conduct further prosecutions in the Baha Mousa case.²⁷¹ In 2018, Director of Service Prosecutions Andrew Cayley stated that ‘Baha Mousa’s violent death provides a powerful and continuing justification for the SPLI, supported by the SPA, to complete its mandate’.²⁷² In June 2020, Cayley, however, acknowledged that it is ‘quite possible’ that no prosecutions will arise out of the SPLI investigation process,²⁷³ and the investigation into the death of Baha Mousa was ultimately closed without further prosecutions being brought.²⁷⁴

Despite the contributions that the Baha Mousa Inquiry has made to the UK’s addressing of systemic issues, it can hardly be argued that the inquiries pursued by the UK have examined the full range of conduct subject to OTP scrutiny. The OTP has stated that:

“on the basis of the information available, there is a reasonable basis to believe that, at a minimum, the following war crimes have been committed by members of UK armed forces: wilful killing/murder under

²⁶⁹ Al Sweady Inquiry Report Volume II (n 254) para 5.101

²⁷⁰ HC Deb 26 March 2012 vol 542 cols 87WS-88WS

²⁷¹ Carla Ferstman, Thomas Obel Hansen and Noora Arajärvi, ‘The UK Military in Iraq: Efforts and Prospects for Accountability for International Crimes Allegations?’, (1 October 2018) <https://www1.essex.ac.uk/hrc/documents/THE_UK_MILITARY_IN_IRAQ_1Oct2018.pdf> (Last accessed 15 May 2021), 35 quoting Leggatt J

²⁷² Andrew Cayley, ‘Constraints and Quality Control in Preliminary Examination: Critical Lessons Learned from the ICTY, the ICC, the ECCC and the United Kingdom’ in Bergsmo and Stahn (eds) (n 246), 61

²⁷³ Beale (n 117)

²⁷⁴ OTP Final Report (n 1) para 215

article 8(2)(a)(i) or article 8(2)(c)(i)); torture and inhuman/cruel treatment under article 8(2)(a)(ii) or article 8(2)(c)(i)); outrages upon personal dignity under article 8(2)(b)(xxi) or article 8(2)(c)(ii)); rape and/or other forms of sexual violence under article 8(2)(b)(xxii) or article 8(2)(e)(vi)).”²⁷⁵

For example, the Baha Mousa Report had a mandate ‘to investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him’.²⁷⁶ Additionally, the Al Sweady Inquiry’s terms of reference were stated in the following terms:

“To investigate and report on the allegations made by the claimants in the Al-Sweady judicial review proceeding against British soldiers of (1) unlawful killing at Camp Abu Naji on 14 and 15 May 2004, and (2) the ill-treatment of five Iraqi nationals detained at Camp Abu Naji and subsequently at the divisional temporary detention facility at Shaibah Logistics Base between 14 May and 23 September 2004, taking account of the investigations which have already taken place, and to make recommendations.”²⁷⁷

Furthermore, in the case of the Chilcot Inquiry, because of the work of IHAT and the Baha Mousa and Al Sweady Reports,²⁷⁸ it was stated:

“the Inquiry Committee decided that it should not examine issues relating to the question of detention. It appeared to the Committee that, if it was to do so, there was a danger that it might duplicate the work of these other Inquiries and investigations or otherwise impede their progress, or the reverse.”²⁷⁹

²⁷⁵ *ibid* para 71

²⁷⁶ HC Deb 21 July 2008 vol 479 col 65WS

²⁷⁷ HC Deb 25 November 2009 vol 501 col 82WS

²⁷⁸ Sir John Chilcot, *The Report of the Iraq Inquiry: Volume I* (2016-2017, HC 265-I) paras 28-35

²⁷⁹ *ibid* para 35

This means that the scope of inquiries which specifically deal with matters relating to individuals in UK custody in Iraq do not address the full range of crimes alleged to have taken place. These inquiries also do not address potentially unlawful action during the full period in which UK personnel are alleged by the OTP to have committed international crimes. The two inquiries examining allegations of detainee abuse addressed conduct which took place in 2003 and 2004. The OTP, on the other hand, examined conduct which took place between 2003 and 2009.²⁸⁰

However, other investigatory steps taken by UK authorities have also been subject to criticism, suggesting that determining the adequacy of an investigation may not be as simple as looking at what type of investigation it is. For example, Ferstman, Hansen and Arajärvi have criticised the extent of investigations carried out as part of the Iraq Fatality Investigations mechanism, which was pursued by the UK government in order to comply with Article 2 of the European Convention on Human Rights,²⁸¹ stating:

“The decision to establish the IFI was important for public disclosure purposes, but IFI has not addressed all cases involving allegations of unlawful death and is not mandated to address cases relating to torture or other ill-treatment matters, nor is or was any other public inquiry (other than the narrowly-focused Baha Mousa inquiry).”²⁸²

Additionally, the Systemic Issues Working Group has been criticised by Bates who states the following in relation to the effect of the definition of systemic issues adopted by the SIWG:²⁸³

²⁸⁰ OTP Final Report (n 1) para 72

²⁸¹ HC Deb 27 March 2014 vol 578 cols 29WS-30WS

²⁸² Ferstman, Obel Hansen and Arajärvi (n 271) 38

²⁸³ The July 2015 SIWG Report – Ministry of Defence, ‘Systemic Issues Identified from Investigations into Military Operations Overseas’ (Ministry of Defence, July 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450319/20150727-mod-annual-report-systemic-issues-july-2015.pdf> (Last accessed 15 May 2021) – on page 1 states that:

“The term “systemic issues” primarily envisages shortcomings of doctrine, policy, training, or supervision that result in unintentional breaches. It encompasses *inter alia* situations where an individual has complied with policy and training, but these have

“It implies too glib a distinction between ‘unintentional breaches’ where policy, training or supervision is flawed, and ‘deliberate acts... in knowing contravention’ of law, training etc. It is possible for training to be flawed and for deliberate, knowing wrongdoing to coincide. The definition implies that deliberate criminal acts occur without a relevant, systemic organisational culture. This ignores the serious deliberate offences perpetrated against Baha Mousa and those detained with him... and the research on military culture’s relevance to the development of soldiers’ understanding and willingness to comply with applicable law.”²⁸⁴

Furthermore, the SIWG has been criticised by Ferstman, Hansen and Arajärvi on the basis that neither it or any other mechanism has ‘considered the adequacy of investigations and prosecutions’ that have already been conducted,²⁸⁵ and that the failure for the SIWG process to lead to further prosecutions has the potential to reduce ‘the effectiveness of the policy changes and other measures that have appropriately been put in place to avoid repetition and ignores the deterrent value of criminal prosecutions’.²⁸⁶

5. Conclusion

As stated at the beginning of this discussion, the purpose of examining the Baha Mousa Report was to assess the extent to which a non-criminal investigation process can contribute to the process of a State being able to demonstrate that it has complied with the principle of complementarity. The

been flawed; where policies issued at different levels have been contradictory, leaving individuals unable to determine whether their actions are correct; and where supervision has been insufficient to identify and address such confusion, or failure to understand and apply training correctly. Deliberate acts by individuals in knowing contravention of the law and of doctrine, policy or training are not systemic issues, and are punishable through the Service Justice system.”

²⁸⁴ Elizabeth Torbe Stubbins Bates, ‘Solving the Conundrum between Military Training, Prevention and Compliance in International Humanitarian Law’ (PhD thesis, SOAS University of London 2018) <https://eprints.soas.ac.uk/30290/1/4580_Bates.pdf> (Last accessed 15 May 2021), 209-10

²⁸⁵ Ferstman, Obel Hansen and Arajärvi (n 271) 10

²⁸⁶ *ibid* 47

Baha Mousa Report does, undoubtedly, provide information on areas that should be of value to the OTP's examination of allegations of misconduct by UK personnel in Iraq in areas such as the loss of doctrine dating back to the 1970s, the banning of the practice of hooding during Operation Telic 1, and measures taken by the UK to address failures in the time between the death of Baha Mousa and the publication of the Baha Mousa Report.

However, it is unclear to what extent the Report does function as an effective investigation of torture in and of itself. The Principles on the Effective Investigation and Documentation and Other Cruel, Inhuman or Degrading Treatment or Punishment state that:

“The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment... include the following:

- (a) Clarification of the facts and establishment and acknowledgment of individual and State responsibility for victims and their families;
- (b) Identification of measures needed to prevent recurrence;
- (c) Facilitation of prosecution or, as appropriate, disciplinary sanctions for those indicted by the investigation as being responsible and demonstration of the need for full reparation and redress from the State...²⁸⁷

In relation to the first purpose of a torture investigation – to clarify the facts, and to establish the responsibility of individuals and the State – it appears that this has only been achieved in part. For example, in relation to the loss of doctrine, as has already been discussed in this Chapter, the Inquiry stated that ‘the only fair conclusion is that the position reached at the outset of Op Telic... resulted from a series of corporate failings and missed opportunities’,²⁸⁸ which cannot be said to be the same as establishing individual responsibility. Additionally, in

²⁸⁷ Istanbul Protocol (n 100) para 78

²⁸⁸ Baha Mousa Inquiry Report Volume II (n 19) para 5.151

relation to the extent that to which the practice of hooding was employed, the Report stated that it was unable to make any findings on the use of hooding across 1 (UK) Division as a whole.²⁸⁹ This means that the Baha Mousa Report did not establish the full facts surrounding the use of hooding, and therefore serves to limit the extent to which the Inquiry can assist in facilitating prosecutions. However, in relation to the second purpose of a torture investigation, as was discussed in the previous section, the Baha Mousa Inquiry did contribute to the process of military reform in the UK.

Notwithstanding the contribution that the Baha Mousa Report did make in terms of providing information about UK conduct in Iraq, and to the process of military reform, the gaps in coverage of the Baha Mousa Report make it difficult to disagree with the assertion of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment, Juan Méndez, who states that 'By itself, a commission of inquiry is never sufficient to fully satisfy a State's obligations under international law with regard to torture and other forms of ill treatment.'²⁹⁰ It is therefore unclear to what extent the Baha Mousa Inquiry does demonstrate that the UK has complied with the principle of complementarity, as whilst the Report is undoubtedly a valuable source of information, it does not constitute a full investigation into alleged detainee abuse.

²⁸⁹ *ibid* paras 8.316-8.317

²⁹⁰ Juan E Méndez, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 69

Chapter Seven: The Iraq Historic Allegations Team

This Chapter will discuss the criminal investigation process launched by the United Kingdom government to investigate allegations of wrongdoing in Iraq, the Iraq Historic Allegations Team (IHAT). IHAT was created in March 2010 to ensure that the UK's investigations of alleged wrongdoing in Iraq 'are carried out thoroughly and expeditiously, so that – one way or another – the truth behind them is established'.¹ IHAT ultimately closed in June 2017 with its cases reassigned to a successor organisation, the Service Police Legacy Investigations (SPLI).² By the time of IHAT's closure in June 2017, it had been in operation for over three times its originally expected lifespan and had received 3405 allegations of ill treatment and unlawful killing.³

The UK government has acknowledged the importance of IHAT as a part of investigative obligations under UK law.⁴ In October 2016, Attorney General Jeremy Wright stated the following regarding the relationship between the work of IHAT and the OTP's preliminary examination:

“As the Committee is well aware, the prosecutor's office of the ICC has expressed interest in any offences that may have been committed by British armed forces, and therefore they have asked about the processes

¹ HC Deb 1 March 2010 vol 506 cols 93WS-94WS

² Ministry of Defence and Michael Fallon, 'IHAT to close at the end of June' (Ministry of Defence, 5 April 2017) <<https://www.gov.uk/government/news/ihat-to-close-at-the-end-of-june>> (Last accessed 15 May 2021)

³ Iraq Historic Allegations Team, 'IHAT Quarterly Update – April to June 2017' (Iraq Historic Allegations Team, 27 July 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644256/20170809-Quarterly_Update_website_Jun17_1_.pdf> (Last accessed 15 May 2021), 2

⁴ Attorney General Jeremy Wright stated that 'the Armed Forces Act 2006 sets out an obligation to investigate potential criminal offences.... The obligation to investigate and then to pursue allegations of criminal offending is one we have within our law.': House of Commons Defence Sub-Committee, 'Oral evidence: MoD support for former and serving personnel subject to judicial processes, HC 109' (House of Commons, 19 October 2016) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/41503.pdf>> (Last accessed 15 May 2021), Q185. Wright also stated at Q224, in relation to whether the IHAT process is fair, that 'What we are doing is what the British justice system requires, which is that if an allegation is made, we investigate that allegation', and at Q262 that 'there are obligations on us as a matter of domestic law to conduct investigations into allegations of this kind.'

whereby this country demonstrates that it is investigating in a proper way whether or not any such offences may have been committed. The IHAT process was always envisaged as a way in which you could carry out those investigations, leading in appropriate cases to prosecutions.”⁵

The purpose of this Chapter therefore is to discuss the extent to which the actions of the UK demonstrate that the UK is determined to conduct genuine investigations into alleged war crimes in Iraq. This will be done by discussing the extent to which the IHAT process was independent, efficient, subject to political interference, or involved attempts to avoid those who committed crimes being held accountable.

It should, however, be noted that not all of the investigations conducted by IHAT fall within the scopes of the OTP’s preliminary examination.⁶ In their 2017 preliminary examination report, the OTP stated that ‘there is no reasonable basis to believe that war crimes within the jurisdiction of the Court were committed by British armed forces in the course of their military operations not related to the context of arrests and detentions.’⁷ IHAT’s final quarterly update, however, indicates that one of IHAT’s ‘strategic priorities’ was ‘allegations of unlawful killing following contact with British forces’.⁸ Additionally, IHAT’s table of work completed highlighted that it closed investigations in relation to

⁵ *ibid* Q185

⁶ See Andrew Cayley, ‘Constraints and Quality Control in Preliminary Examination: Critical Lessons Learned from the ICTY, the ICC, the ECCC and the United Kingdom’ in Morten Bergsmo and Carsten Stahn (eds) *Quality Control in Preliminary Examination: Volume One* (Torkel Opsahl Academic EPublisher, 2018), 55-56 for a short explanation of how the IHAT investigation process works.

⁷ Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2017’ (International Criminal Court, 4 December 2017) <https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf> (Last accessed 15 May 2021), para 196. The 2018 Preliminary Examination Report also contains wording to the same effect at paras 197-98: Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2018’ (International Criminal Court, 5 December 2018) <<https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>> (Last accessed 15 May 2021) and the 2019 Preliminary Examination Report at para 163 only refers to crimes being committed in situations where the victim was in the custody of UK forces: Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2019’ (International Criminal Court, 5 December 2019) <<https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>> (Last accessed 15 May 2021)

⁸ Iraq Historic Allegations Team (n 3) 2

allegations where there was no identifiable criminal offence;⁹ situations where the allegations were more consistent with the practices used by other States;¹⁰ where detainees were in the custody of other States;¹¹ and, as highlighted by Minister for the Armed Forces Penny Mordaunt,¹² a situation where Danish forces had previously accepted responsibility for the death.¹³

1. Litigation Addressing the Independence of IHAT

In March 2010, the High Court granted permission for a judicial review seeking to force the UK government to launch an inquiry into allegations of abuse perpetrated by UK personnel in Iraq.¹⁴ The issues at question in this case were whether IHAT was independent,¹⁵ and whether an immediate inquiry into these allegations was required for the UK to satisfy its investigative duty under Article 3 of the European Convention on Human Rights (ECHR).¹⁶ Whilst the OTP stated in their final report that that ‘the ICC is not acting as a human rights court’,¹⁷ their assessment of the UK’s compliance with the principle of complementarity that they ‘cited human rights jurisprudence to the extent that it may assist in the interpretation of relevant terms in article 17(2)’.¹⁸ Additionally,

⁹ For example, IHAT 123, where it was stated that ‘there are no further lines of enquiry for the IHAT to pursue in regards to identifying whether a crime has been committed by a British service person in this case’: Iraq Historic Allegations Team, ‘IHAT table of work completed (updated October 2017)’ (Iraq Historic Allegations Team, 4 October 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649525/20171003-IHAT_NEW_master_copy_website_work_completed_table-HQComms_O.pdf> (Last accessed 15 May 2021), 13.

¹⁰ See, for example, IHAT 180, *ibid* 19, where IHAT state that ‘the tactics, techniques and procedures described were more akin to US armed forces’.

¹¹ See, for example IHAT 83, *ibid* 8, where the allegation concerned the death of a prisoner of war in US custody. See Office of the Prosecutor, ‘Situation in Iraq/UK: Final Report’ (Office of the Prosecutor, 9 December 2020) <<https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>> (Last accessed 15 May 2021) 63-65 for statistics on the reasons why allegations were dismissed by IHAT, including where there had been no involvement of UK forces.

¹² Penny Mordaunt, ‘Letter to Carla Ferstman, dated 22 February 2016’ <<https://redress.org/wp-content/uploads/2017/12/Reply-from-Ministry-of-Defence-22February-Correspondence-with-UK-Government-on-IHAT-Investigation.pdf>> (Last accessed 15 May 2021); HC Deb 27 January 2016 vol 605 col 204WH

¹³ See IHAT 377: IHAT table of work completed (n 14) 21

¹⁴ *Ali Zaki Mousa and Others v Secretary of State for Defence* [2010] EWHC 1823 (Admin)

¹⁵ *R (on the application of Ali Zaki Mousa) v Secretary of State for Defence* [2010] EWHC 3304 (Admin), para 5

¹⁶ *ibid*

¹⁷ Office of the Prosecutor Final Report (n 11) para 287

¹⁸ *ibid*

as will be made clear in the remainder of this section, the UK's obligations under the ECHR, rather than the Rome Statute, were the focus of judicial proceedings. It should therefore be noted that in *Assenov*, the European Court of Human Rights (ECtHR) stated the following in relation to allegations of torture or inhuman treatment:

“where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention”, requires that there should be an effective official investigation. This investigation... should be capable of leading to the identification and punishment of those responsible... If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance... would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.”¹⁹

The ECtHR has made similar statements in relation to alleged violations of the right to life under Article 2 of the ECHR.²⁰ In relation to the investigation of alleged war crimes, the ECtHR stated in *Brecknell v United Kingdom* that:

“there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity.”²¹

¹⁹ *Assenov and Others v Bulgaria* 1998-VIII, para 102. See also *El-Masri v The Former Yugoslav Republic of Macedonia* App no 39630/09 (ECtHR, 13 December 2012), para 182

²⁰ See, for example, *McCann and Others v United Kingdom* (1995) Series A no 324, para 161; *Association “21 December 1989” and Others v Romania* App Nos 33810/07 and 18817/08 (ECtHR, 24 May 2011), para 133; *Al-Skeini and Others v United Kingdom* App no 55721/07 (ECtHR, 7 July 2011), para 163

²¹ *Brecknell v United Kingdom* App No 32457/04 (ECtHR, 27 November 2007), para 69

The court in *Ali Zaki Mousa* ultimately held that IHAT was independent.²² The court also determined that no immediate inquiry was required in order to satisfy the UK's Article 3 ECHR obligations.²³ The High Court's discussion on the independence of IHAT concentrated on three areas: whether IHAT investigators were independent of the military chain of command to conduct investigations into the army,²⁴ whether those responsible for charging individuals with crimes were independent,²⁵ and whether the involvement of the RMP in Iraq meant they were not independent because, as IHAT's investigators, the RMP would potentially be investigating the conduct of the RMP.²⁶

In relation to whether IHAT investigators were sufficiently independent of IHAT, the High Court found that IHAT, as an institution, and its investigators operated outside the ordinary military chain of command,²⁷ and stated that the fact that RMP personnel were members of the army did not automatically mean that any investigation into army personnel lacked independence.²⁸ The court found that charging decisions did not lack independence because in relation to those offences which fall within Schedule 2 of the Armed Forces Act 2006, the decision about whether to prosecute rests with either the Director of Service Prosecutions or a commanding officer from a different unit to the one which the soldier under investigation belonged.²⁹ It was also decided, based on evidence presented that (a) the primary role of General Police Duties (GPD) branch of the RMP was in front line police duties and the Service Investigations Branch's (SIB) role was to investigate crimes involving UK personnel,³⁰ (b) the GPD was not involved in IHAT,³¹ and (c) the role of the SIB in Iraq was 'much more limited' than that of the GPD,³² there was not 'general cause for concern' about

²² *Ali Zaki Mousa* (n 15) para 87

²³ *ibid* para 134

²⁴ *ibid* para 28

²⁵ *ibid*

²⁶ *ibid*

²⁷ *ibid* para 37

²⁸ *ibid* para 42

²⁹ *ibid* para 67

³⁰ *ibid* paras 72-75

³¹ *ibid* para 81

³² *ibid*

the independence of IHAT investigators.³³ The court did, however, state that IHAT did have to ensure that investigators were not involved in cases with which they were already familiar.³⁴

However, on appeal, it was held that the High Court's decision in relation to the effect of the RMP's involvement in Iraq on IHAT's independence was based on a 'misapprehension about the involvement of GPD members in IHAT' and additional evidence not previously available.³⁵ The Defence Secretary had accepted that the GPD were involved in IHAT.³⁶ Additionally, the Court of Appeal found that the involvement of the RMP was much more substantial than the role presented by the High Court with the Military Police Service being found to be responsible for the oversight of detention facilities.³⁷ It was also found that the Provost Marshal (Army), Brigadier Edward Forster-Knight, in his previous role as Provost Marshal for 1 (UK) Division, was in 'direct command' of troops deployed to support the Black Watch and the 2nd Battalion Royal Regiment of Fusiliers,³⁸ and:

"He also had a functional and coordinating responsibility for the other RMP units in theatre although they remained under the direct command of their respective formations or units to which they were providing support. Amongst other things, he acted as advisor to GOC 1 (UK) Armed Div on policing, custodial and detention matters. As PM, he had direct access to the GOC."³⁹

Whilst the Court of Appeal stated that there was 'no evidence' that any IHAT investigators were implicated in any alleged wrongdoing in Iraq,⁴⁰ it was held that IHAT did lack independence with Kay LJ stating:

³³ *ibid*

³⁴ *ibid* para 82

³⁵ *R (on the application of Mousa) v Secretary of State for Defence and Another* [2011] EWCA Civ 1334, para 38

³⁶ *ibid* para 11

³⁷ *ibid* paras 24-33

³⁸ *ibid* para 28

³⁹ *ibid*

⁴⁰ *ibid* para 35

“it is impossible to avoid the conclusion that IHAT lacks the requisite independence. The problem is that the Provost Branch members of IHAT are participants in investigating allegations which, if true, occurred at a time when Provost Branch members were plainly involved in matters surrounding the detention and interment of suspected persons in Iraq. They had important responsibilities as advisers, trainers, processors and “surety for detention operations”. If the allegations or significant parts of them are true, obvious questions would arise about their discharge of those responsibilities. SIB, GPD and MPS members would all come under scrutiny. Moreover, the PM (A) himself and his predecessors would also likely be called to account, given his position as head of the Provost Branch and the nature of his responsibilities in Iraq as Brigadier Forster-Knight described them. It is, of course, to him that IHAT is required to report.”⁴¹

On the basis that IHAT lacked the required level of independence required for the UK to be able to discharge its investigative duties under Article 3 of the ECHR, the Court held that the UK’s approach of reserving judgment on whether an inquiry should be launched until IHAT had completed its work was no longer justifiable,⁴² and stated that it was for the Defence Secretary to decide how the UK would discharge its obligations under Article 3 of the ECHR.⁴³

On 26 March 2012, the Minister for the Armed Forces, Nick Harvey, announced that the government accepted the decision of the Court of Appeal and stated that the role of the RMP and Provost Marshal (Army) would be assumed by the Royal Navy Police and the Provost Marshal (Navy).⁴⁴ At the same time, it was announced that IHAT would examine the case of Baha Mousa and any allegations referred to IHAT as a result of the judgment of the European Court of Human Rights in *al-Skeini*.⁴⁵

⁴¹ *ibid* para 36

⁴² *ibid* paras 40-48

⁴³ *ibid* para 49

⁴⁴ HC Deb 26 March 2012 vol 542 cols 87WS-88WS

⁴⁵ *ibid*

In *Ali Zaki Mousa (No. 2)*, the claimants again sought an inquiry and argued that IHAT was still not independent, even after the changes made to IHAT's structure by the Ministry of Defence.⁴⁶ In this case, prior to making a finding on the independence of IHAT as it was reformulated, the High Court made a number of points in relation to the role of the Royal Navy Police and Provost Marshal (Navy). These included that the involvement of the Royal Police (RNP) in investigations in Iraq was to 'investigate isolated incidents in relation to the conduct of naval personnel who were drunk or involved in misconduct towards other naval personnel or in respect of one who had negligently discharged a firearm',⁴⁷ and that when RNP personnel did visit the Joint Forward Interrogation Team, it was to assist Iraqi police in an investigation.⁴⁸ The court also stated that no RNP personnel who were still serving and had served in Iraq conducted interrogations of Iraqi civilians.⁴⁹ Additionally, whilst it was found that members of the Royal Navy did serve in the Joint Forward Interrogation Team, there was no RNP involvement at the Joint Forward Interrogation Team.⁵⁰ Furthermore, it was found that 'no senior officer in the Royal Navy Police had any involvement in the formulation of detention and interrogation policy or training',⁵¹ and that 'The role of other members of the Royal Navy Police in the development of land-based detention and interrogations policy and training was minor'.⁵² Finally, the Court found that in relation to investigations, the Provost Marshal (Navy) was independent of the armed forces and government.⁵³

The Court ultimately held that 'IHAT is independent and objectively can be seen as independent'.⁵⁴ This appears to be a conclusion that is shared by the OTP, who stated in their final report that IHAT did not operate in a manner which was inconsistent with the UK's obligations under the principle of complementarity.⁵⁵

⁴⁶ *R (Ali Zaki Mousa and Others) v Secretary of State for Defence (No. 2)* [2013] EWHC 1412 (Admin), para 1

⁴⁷ *ibid* para 49

⁴⁸ *ibid*

⁴⁹ *ibid* para 50

⁵⁰ *ibid* paras 58-59

⁵¹ *ibid* para 72

⁵² *ibid*

⁵³ *ibid* para 78. The court did, however, note at para 79 that the power to discipline the Provost Marshal (Navy) and the Royal Navy Police rested with another commander.

⁵⁴ *ibid* para 109

⁵⁵ Office of the Prosecutor Final Report (n 11) para 458

Despite finding that IHAT was independent, Silber J did still express concern about the progress that IHAT was making in the third year of its existence. For example, Silber J stated that ‘IHAT is not structured so that decisions can be effectively and promptly taken as to whether there is a realistic prospect of prosecution’,⁵⁶ and stated that the Director of Service Prosecutions should be involved at an earlier stage in order to review whether prosecutions should be brought.⁵⁷ Furthermore, concerns about delays to the IHAT process,⁵⁸ and the failure of IHAT to examine systemic issues were also addressed.⁵⁹ In a further decision in the *Ali Zaki Mousa (No. 2)* case, Silber J confirmed the appointment of Leggatt J as Designated Judge,⁶⁰ with part of his role being to hold IHAT to account for further delays involving allegations of unlawful killings.⁶¹ These themes will be touched upon later in this Chapter.

2. Political Interference in IHAT?

Before assessing whether IHAT has been the subject of political interference, it is worth noting the comments of Silber J in *Ali Zaki Mousa (No. 2)* on the nature of the relationship between the executive and an investigative body:

“It is axiomatic that decisions on whether to pursue an investigation and then whether to prosecute must be made independently of the Executive. No civil servant, let alone a Minister can be permitted to have any influence whatsoever. It is clear that in making such a decision the police are constitutionally independent of the Executive and of any local authority or official to which they are accountable in other matters... We can see no reason why the service police could be in any different position. They must be able to make their decisions entirely independently of the Secretary of State for Defence, any civil servant in

⁵⁶ *Ali Zaki Mousa (No. 2)* (n 46) para 182

⁵⁷ *ibid* paras 182 and 228

⁵⁸ *ibid* para 187

⁵⁹ *ibid* paras 192-194

⁶⁰ *R (Ali Zaki Mousa and Others) v Secretary of State for Defence (No. 2)* [2013] EWHC 2941 (Admin), para 6

⁶¹ *ibid* para 8

that Ministry and, even more importantly, of anyone in the hierarchy of the armed forces.”⁶²

If the allegations that the UK has brought investigations to a premature end and/or damaged the work of IHAT through its public rhetoric, it would appear that in such circumstances, a UK court would be unable to declare that the IHAT process was independent. Such conduct should also have an effect on the ICC’s determination on whether the UK has complied with the principle of complementarity or not since Article 17(2)(c) of the Rome Statute states that one of the factors used to determine unwillingness is whether:

“proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice”⁶³

This section will therefore discuss government criticism of those responsible for presenting allegations of misconduct by UK personnel in the lead up to the closure of IHAT as well as the circumstances surrounding the closure of IHAT.

a. Government Criticism of Those Responsible for Presenting Allegations of Misconduct

When responding to the publication of the Baha Mousa Report in September 2011, Liam Fox spent the majority of his speech apologising for the mistakes which led to mistreatment of detainees and the death of Baha Mousa, expressed the view that those who were responsible for crimes should be held

⁶² *Ali Zaki Mousa (No. 2)* (n 46) para 74. This is a duty that government ministers appeared to be aware of as Defence Secretary Michael Fallon wrote in an article in the *Daily Mail* that ‘Anyone who thinks that civil servants have the authority to direct or to influence the decisions of criminal investigators or prosecutors does not understand our justice system, where independence is crucial.’: Michael Fallon, ‘Members of our armed forces were victims of a charismatic conman who exploited vulnerabilities in the legal system’ (*Daily Mail*, 10 February 2017) <<https://www.dailymail.co.uk/news/article-4213576/Troops-victims-charismatic-conman.html>> (Last accessed 15 May 2021)

⁶³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 17(2)(c)

accountable, and discussed the reforms that were made prior to the Baha Mousa Report and other actions that would be taken to ensure that such an incident never occurred again.⁶⁴ However, the response to the publication of the Al Sweady Report in December 2014 was markedly different. Defence Secretary Michael Fallon only spent a small proportion of his speech discussing the findings that British troops had been responsible for mistreatment against Iraqi detainees,⁶⁵ and instead stated that the inquiry was ‘unnecessary’.⁶⁶ Fallon further criticised the conduct of those making allegations against UK forces and those lawyers representing them (the legal firms Leigh Day and Public Interest Lawyers),⁶⁷ stating that the inquiry was ‘a shameful attempt to use our legal system – our legal system to attack and falsely impugn our armed forces’.⁶⁸

Whilst the Al-Sweady Report did find that UK personnel were responsible for mistreatment towards Iraqi detainees,⁶⁹ it dismissed allegations that UK forces were responsible for unlawful killings and the desecration of bodies in the context of the Battle of Danny Boy and its aftermath.⁷⁰ The inquiry’s chair Sir Thayne Forbes stated:

“the vast majority of allegations made against the British military, which this inquiry was required to investigate... were wholly and entirely without merit or justification. Very many of those baseless allegations were the product of deliberate and calculated lies on the part of those who made them”.⁷¹

⁶⁴ HC Deb 8 September 2011 vol 532 cols 571-73

⁶⁵ HC Deb 17 December 2014 vol 589 col 1408

⁶⁶ *ibid* col 1409

⁶⁷ *ibid* cols 1407-1409

⁶⁸ *ibid* col 1409

⁶⁹ See, for example, Sir Thayne Forbes, *The Report of the Al Sweady Inquiry: Volume II* (2014-2015, HC 818-II), para 3.173 in relation to a finding that the use of strip searches amounted to ill-treatment; para 3.350 for a finding that the invasion of personal space whilst detainees were blindfolded amounted to ill-treatment; para 3.358 for a finding that the striking of a tent peg on a table during tactical questioning amounted to ill-treatment; para 3.364 for a finding that the use of shouting to intimidate detainees during tactical question was constituted ill-treatment; and para 3.736 where it was found that the use of sleep deprivation constituted ill-treatment.

⁷⁰ Sir Thayne Forbes, *The Report of the Al Sweady Inquiry: Volume I* (2014-2015, HC 818-I), para 2.2392

⁷¹ Al Sweady Inquiry Volume II (n 69) para 5.198. See also para 5.201 where it is stated ‘the work of this Inquiry has established beyond doubt that all the most serious allegations, made against the British soldiers involved in the Battle of Danny Boy and its aftermath and which have been hanging over those soldiers for the last 10 years, have been found to be wholly without

Forbes additionally stated, ‘the approach of the detainees and a number of the other Iraqi witnesses, to the giving of their evidence, was both unprincipled in the extreme and wholly without regard for the truth.’⁷² This was contrasted with the conduct of British troops whom Forbes stated that ‘Except where otherwise expressly stated, in general I found the military witnesses to be both truthful and reliable’.⁷³ Williams stated that the findings of the Al Sweady Report ‘gave a fillip to the MoD’s argument long maintained that there was no need for any wide-scale scrutiny into the army or the government’s planning for and conduct in Iraq’.⁷⁴

In the months and years that followed the Al Sweady Report’s publication, those who represented individuals presenting allegations of wrongdoing by UK military personnel were subject to criticism by high-profile political figures including the Minister for the Armed Forces,⁷⁵ the Lord Chancellor,⁷⁶ and successive Prime Ministers in David Cameron⁷⁷ and Theresa May.⁷⁸ In

foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility’.

⁷² *ibid* para 5.199

⁷³ *ibid* para 5.200

⁷⁴ AT Williams, ‘Iraq abuse allegations: Resist, deny, hide’ (openDemocracy, 20 November 2016) <<https://www.opendemocracy.net/en/shine-a-light/iraq-abuse-allegations-resist-deny-hide/>> (Last accessed 15 May 2021)

⁷⁵ See, for example, HC Deb 27 January 2016 vol 605 col 203WH, where it is stated that ‘The behaviour of parasitic law firms churning out spurious claims against our armed forces on an industrial scale is the enemy of justice and humanity, not our armed forces’.

⁷⁶ Steve Hawkes, ‘Justice Secretary Liz Truss declares war on tank-chasing lawyers and vows to stop taxpayers’ cash funding their claims’ (*The Sun*, 3 October 2016)

<<https://www.thesun.co.uk/news/1898618/justice-secretary-liz-truss-declares-war-on-tank-chasing-lawyers-and-vows-to-stop-taxpayers-cash-funding-their-claims/>> (Last accessed 15 May 2021)

⁷⁷ Press Association, ‘David Cameron calls for on action in ‘spurious claims’ against Iraq veterans’ (*The Guardian*, 22 January 2016) <<https://www.theguardian.com/uk-news/2016/jan/22/david-cameron-calls-for-action-on-spurious-claims-against-iraq-veterans>> (Last accessed 15 May 2021)

⁷⁸ Jessica Elgot, ‘Theresa May will oppose ‘vexatious’ allegations against Iraq UK troops’ (*The Guardian*, 21 September 2016) <<https://www.theguardian.com/world/2016/sep/21/theresa-may-will-oppose-vexatious-allegations-against-iraq-uk-troops>> (Last accessed 15 May 2021) It should also be noted that the political party to which all the politicians mentioned so far in this section, the Conservative Party, have also pledged to take action to prevent constant legal challenges from being brought in relation to members of the armed forces in three successive general election manifestos. In 2015, the Party stated, ‘We will ensure our armed forces overseas are not subject to persistent human rights claims that undermine their ability to do their job.’: Conservative Party, ‘The Conservative Party Manifesto 2015’ (Conservative Party, 2015) <<https://web.archive.org/web/20150414212623/https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>> (Last accessed 15 May

response to a letter from a group of 7 Non-Governmental Organisations which stated that rhetoric from the Prime Minister and Defence Secretary about lawyers who bring claims alleging that members of the UK armed forces were responsible for misconduct in Iraq was ‘ill-judged and inappropriate, as well as damaging to the important ongoing work of the Iraq Historical Allegations Team’,⁷⁹ Minister for the Armed Forces Penny Mordaunt defended the government’s conduct in completely unambiguous terms:

“I do not see any impropriety – perceived or actual – in Ministers drawing attention to the fact that a significant proportion of the claims are false and to the impact that these investigations are having on Service Personnel and Veterans, particularly on those who have developed mental health problems as a result of their military service. Indeed, we would be failing in our duty to our Service Personnel and Veterans if we allowed the practice of bringing false or otherwise unmeritorious legal claims to remain unchallenged.”⁸⁰

There was clearly fault on the part of some of those representing Iraqi claimants. For example, the head of Public Interest Lawyers, Philip Shiner, was struck off the roll of solicitors after being found guilty of multiple counts of professional misconduct.⁸¹ This is, however, not true of all lawyers, as can be

2021), 77. Their 2017 manifesto stated, ‘We will strengthen legal services regulation and restrict legal aid for unscrupulous law firms that issue vexatious legal claims against the armed forces’: Conservative and Unionist Party, ‘The Conservative and Unionist Party Manifesto 2017’ (Conservative Party, 2017) <<https://web.archive.org/web/20170603020303/https://s3.eu-west-2.amazonaws.com/manifesto2017/Manifesto2017.pdf>> (Last accessed 15 May 2021), 41. Finally, in their 2019 manifesto, the Conservatives stated ‘we will introduce new legislation to tackle the vexatious legal claims that undermine our armed forces’: Conservative and Unionist Party, ‘The Conservative and Unionist Party Manifesto 2019’ (Conservative Party, 2019) <https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf> (Last accessed 15 May 2021), 52

⁷⁹ Freedom from Torture and Others, ‘Letter to David Cameron Re Ongoing IHAT investigations’ (27 January 2016) <<https://redress.org/wp-content/uploads/2017/12/ngo-letter-to-cameron-270116.pdf>> (Last accessed 15 May 2021)

⁸⁰ Penny Mordaunt Letter (n 12) 2

⁸¹ *Solicitors Regulation Authority v Philip Shiner*, SDT Case No. 11510/2016 (Solicitors Disciplinary Tribunal, 2 February 2017). See also, Solicitors Regulation Authority, ‘Professor Phil Shiner and the Solicitors Disciplinary Tribunal’ (Solicitors Regulation Authority, 2 February 2017) <<https://www.sra.org.uk/sra/news/press/2017/shiner-strike-off-sdt-february-2017/>> (Last accessed 15 May 2021)

demonstrated by the fact that professional misconduct allegations brought against Leigh Day in relation to the Al Sweady Inquiry were dismissed.⁸² Additionally, as Ferstman, Hansen and Arajärvi point out, not all claims brought by Public Interest Lawyers have been found to be without merit with the *Alseran* case being a recent example of a Public Interest Lawyers case in which the claimants were successful.⁸³ Furthermore, it is noted in the OTP's final report on the UK preliminary examination that of the final 82 allegations being investigated by the SPLI, '71 of 82 allegations were in fact PIL-related.'⁸⁴

In a July 2017 letter to the Attorney General regarding the government's use of rhetoric criticising the conduct of Leigh Day, Harriet Harman, who serves as the Chair of the Joint Committee on Human Rights, wrote:

"I am sure you will agree that it is not for the government to decide whether any case against it is justified. That is a matter for the court. It is not for the government to decide if any case is vexatious or wrongly brought. That too, is for the court. It is not for the government to decide who should be in the legal profession. That is for the profession and the independent Solicitors Regulatory Authority."⁸⁵

It is also clear from other areas of law that rhetoric used by the government may have an impact on the independence and operation of the justice system. For example, in response to the Home Office describing immigration lawyers as 'activist lawyers',⁸⁶ the Law Society, the representative body for Solicitors in England and Wales issued a strongly worded rebuke, which stated that the

⁸² *Solicitors Regulation Authority v Day* [2018] EWHC 2726 (Admin)

⁸³ Carla Ferstman, Thomas Obel Hansen and Noora Arajärvi, 'The UK Military in Iraq: Efforts and Prospects for Accountability for International Crimes Allegations', (1 October 2018) <https://www1.essex.ac.uk/hrc/documents/THE_UK_MILITARY_IN_IRAQ_1Oct2018.pdf> (Last accessed 15 May 2021), 32

⁸⁴ Office of the Prosecutor Final Report (n 11) para 346

⁸⁵ Harriet Harman, 'Ministers must not attack independent legal professionals – letter to the Attorney General' (Harriet Harman, 13 July 2017) <https://www.harrietharman.org/ministers_must_not_attack_independent_legal_professionals_the_times> (Last accessed 15 May 2021)

⁸⁶ Aubrey Allegretti, 'Home Office admits video attacking lawyers who help migrants was wrong' (Sky News, 27 August 2020) <<https://news.sky.com/story/home-office-admits-video-attacking-lawyers-who-help-migrants-was-wrong-but-wont-remove-it-12058005>> (Last accessed 15 May 2021)

independence of the British justice system ‘hinges on lawyers and judges not being hindered or intimidated in carrying out their professional duties and not being identified with their clients or their clients’ causes’.⁸⁷

When referencing criticism of lawyers who presented allegations of misconduct by UK personnel in their final report, the OTP stated that:

“the overall position of the UK government can perhaps best be described as forward looking, seeking to prevent a recurrence. In terms of addressing criminal accountability for past abuses, the approach suggests that the UK Government, and in particular the MoD, have at best been reluctant, if not at times hostile, partners to pursuing claims of criminal responsibility against members of UK armed forces.”⁸⁸

The OTP additionally found that government statements were based on a misapprehension of the findings of the Solicitor’s Disciplinary Tribunal and the Al-Sweady Report,⁸⁹ and they stated that IHAT’s eventual closure was ‘driven largely by political considerations in the form of a publicly stated commitment to protect the UK armed forces’.⁹⁰ Furthermore, it was noted that IHAT employees felt discomfort as a result of criticism of IHAT by political figures and the media.⁹¹ These factors appear not to have made a difference to the OTP’s ultimate assessment of the principle of complementarity, as the OTP decided to close their preliminary examination into the UK, as the OTP stated that:

“The Office has carefully considered allegations that the MoD of the UK Government sought to interfere with the activities of IHAT. The Office does not discount the impact that such political pressure may have had on the timelines and material resources available to IHAT to complete its

⁸⁷ Law Society, ‘Attacks on the legal profession undermine the rule of law’ (Law Society, 27 August 2020) <<https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/attacks-on-the-legal-profession-undermine-the-rule-of-law>> (Last accessed 15 May 2021)

⁸⁸ Office of the Prosecutor Final Report (n 11) para 461

⁸⁹ *ibid* paras 462-63

⁹⁰ *ibid* para 457

⁹¹ *ibid* para 399

work. However... the Office has not identified specific information that would substantiate the conclusion that political pressure to close IHAT undermined or jeopardised the independence or impartiality of IHAT/SPLI and the SPA's work in the specific cases under investigation or referred for prosecution."⁹²

b. The Closure of IHAT

Discontent regarding the IHAT process was neither confined to the government frontbenches or just to lawyers, the mechanism through which soldiers were being investigated itself was subject to criticism from backbenchers. For example, in February 2016, when announcing that the House of Commons Defence Select Committee would investigate the work of IHAT, Johnny Mercer stated that 'No other country is putting it's service men and women through the shambolic process that is IHAT'.⁹³ The report of this inquiry of the House of Commons Defence Sub-Committee,⁹⁴ which was chaired by Mercer, was published in February 2017 and made it clear that the IHAT process had to end:

"IHAT... has proved to be unfit for purpose. It has become a seemingly unstoppable self-perpetuating machine and one which has proved to be deaf to the concerns of the armed forces, blind to their needs, and profligate with its own resources. We look to the Secretary of State to set a firm and early date for the remainder of the investigations to be concluded, and for the residue of cases to be prosecuted by a replacement body which can command the confidence of the armed forces."⁹⁵

⁹² *ibid* para 458

⁹³ Johnny for Plymouth, 'MP secures Defence Committee inquiry into IHAT investigations' (Johnny for Plymouth, 5 February 2016) <<https://www.johnnyforplymouth.co.uk/mp-secures-defence-committee-inquiry-into-ihat-investigations/>> (Last accessed 15 May 2021)

⁹⁴ For the announcement that the inquiry would be conducted by the House of Commons Defence Sub-Committee, see House of Commons Defence Sub-Committee, 'New inquiry: Support for Service personnel subject to judicial processes' (UK Parliament, 28 April 2016) <<https://old.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/defencesubcommittee/news/mod-support-for-personnel-launch-15-16/>> (Last accessed 15 May 2021)

⁹⁵ House of Commons Defence Committee, *Who guards the guardians? MoD support for former and serving personnel* (2016-2017, HC 109), para 122

Ferstman, Hansen and Arajärvi state that the government's approach to criminal investigation structures in relation to allegations of abuse in Iraq leaves the impression that it has been acting politically in order to evade accountability for any crimes that may have taken place.⁹⁶ It is difficult to disagree with this notion since, in the midst of a process in which the Ministry of Defence and the Defence Sub-Committee were jostling with each other to make an announcement in relation to IHAT first, the MoD announced that IHAT would close.⁹⁷ Hansen stated in relation to the connection between the findings of the Defence Sub-Committee and the MoD's announcement to close IHAT that 'it is hard to view the Committee's recommendations as anything but a significant blow to positive complementarity.'⁹⁸

The announcement that IHAT would close may have an effect on the UK's ability to demonstrate to the OTP that it has complied with the principle of complementarity. The reason for this is that when justifying the UK's closure of IHAT, the UK government made it clear that the findings against Shiner had a significant effect on IHAT's projected caseload. A statement released by the MoD stated that:

"The exposure of the dishonesty of Mr Shiner meant that many of the allegations that his now defunct firm, Public Interest Lawyers, had brought forward were discredited and enabled the Defence Secretary to decide to close IHAT. IHAT's caseload is expected to reduce from a peak of over 3000 allegations to around 20 investigations by the time it closes."⁹⁹

⁹⁶ Ferstman, Hansen and Arajärvi (n 83) 50

⁹⁷ Carl Dinnen, 'The real reason the MoD pulled the plug on Iraq War probe today' (ITV News, 10 February 2017) <<https://www.itv.com/news/2017-02-10/the-real-reason-the-mod-shut-probe-into-iraq-war-troops>> (Last accessed 15 May 2021); Johnny Mercer, 'Seven years and £30m later: we finally back our frontline troops' (*The Telegraph*, 11 February 2017) <<https://www.telegraph.co.uk/news/2017/02/11/seven-years-30m-later-finally-back-frontline-troops/>> (Last accessed 15 May 2021)

⁹⁸ Thomas Obel Hansen, 'Complementarity (in)action in the UK?' (EJIL:Talk!, 7 December 2018) <<https://www.ejiltalk.org/complementarity-inaction-in-the-uk/>> (Last accessed 15 May 2021)

⁹⁹ Ministry of Defence and Michael Fallon (n 2)

The reduction of expected IHAT investigations to 20 marked a two-thirds reduction in the number of investigations that IHAT had expected to be conducting by the Summer of 2017. Both the IHAT Deputy Director Commander Hawkins and the Defence Secretary Michael Fallon had told the Defence Sub-Committee prior to Shiner being struck off the roll of solicitors that IHAT was projecting to investigate around 60 cases at that point.¹⁰⁰ The government's response to the Report of the Defence Sub-Committee further explained the reasons for the reduction in IHAT's projected caseload stating that:

“As Mr Shiner's involvement has vitiated so many of the allegations, the Director of IHAT concluded, with the advice of the Director of Service Prosecutions, that by the summer the number of cases which should be investigated will be greatly diminished, probably to around 20.”¹⁰¹

The announcement that IHAT would close was met by a barrage of criticism. For example, the Non-Governmental Organisation REDRESS stated that IHAT's closure meant that allegations of mistreatment in Iraq may not be investigated.¹⁰² The ECCHR, whose initial joint communication with PIL to the OTP led to the opening of the Preliminary Examination into the UK, stated in a 2019 follow-up communication to the OTP that the UK was attempting to use the striking off of Phil Shiner in an attempt to prevent British personnel from

¹⁰⁰ House of Commons Defence Sub-Committee, 'Oral evidence: MoD Support for Former and Serving Personnel Subject to Judicial Process, HC 109' (House of Commons, 15 November 2016)

<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/43357.pdf>> (Last accessed 15 May 2021), Q399; House of Commons Defence Sub-Committee, 'Oral evidence: MoD Support for former and serving personnel subject to judicial processes, HC 109' (House of Commons, 14 December 2016)

<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/44527.pdf>> (Last accessed 15 May) Q516

¹⁰¹ House of Commons Defence Committee, *Who guards the guardians? MoD support for former and serving personnel: Government Response to the Committee's Sixth Report* (2016-2017, HC 1149), 7

¹⁰² REDRESS, 'IHAT closure threatens proper investigations into allegations of torture by the UK' (REDRESS, 10 February 2017) <<https://redress.org/news/ihat-closure-threatens-proper-investigations-into-allegation-of-torture-by-the-uk/>> (Last accessed 15 May 2021)

being held accountable in Iraq.¹⁰³ Additionally, the Legal Director of REDRESS, Carla Ferstman, expressed doubts about why IHAT's investigation process would be affected by the disciplinary action taken against Shiner:

“The ethics of a lawyer in a single case doesn't say anything about the strength or weakness of the evidence itself, which should have been independently investigated and any underlying crimes prosecuted. Indeed, IHAT never relied exclusively on claimant lawyers for its evidence; IHAT undertook its own investigations, and there were a number of ICRC reports of abuse along with service personnel witnesses, some of whom had sounded their alarm about mistreatment as early as 2003.”¹⁰⁴

The problem with the justification for IHAT's closure is that months earlier, the UK appeared to be of the view that IHAT investigations as well as IHAT itself could not be closed down purely based on the notion that a substantial percentage of allegations referred to IHAT originated from PIL. Attorney General Jeremy Wright, for example, told the Defence Sub-Committee, 'I'm afraid, the obligation to investigate still exists, even if it came from Mr Shiner and his company'.¹⁰⁵

It should also be noted that IHAT's successor organisation, the SPLI stated that it inherited 1260 allegations at the time it opened.¹⁰⁶ Of these allegations, 1145

¹⁰³ European Center for Constitutional and Human Rights 'Follow-up communication by the European Center for Constitutional and Human Rights to the Office of the Prosecutor of the International Criminal Court' (ECCHR, 31 July 2019)

<https://www.ecchr.eu/fileadmin/Juristische_Dokumente/ECCHR_Follow_Up_Communication_to_OTP_War_crimes_by_UK_forces_in_Iraq_July_2019.pdf> (Last accessed 15 May 2021) 31

¹⁰⁴ Carla Ferstman, 'Why the ICC examination into Torture and other abuses by UK soldiers in Iraq must continue' (openDemocracy, 16 July 2017)

<<https://www.opendemocracy.net/en/opendemocracyuk/why-icc-examination-into-torture-and-other-abuses-by-uk-soldiers-in-iraq-must-cont/>> (Last accessed 15 May 2021)

¹⁰⁵ House of Commons Defence Sub-Committee (n 4) Q214

¹⁰⁶ Service Police Legacy Investigations, 'SPLI Quarterly Update: 1 July to 30 September 2018' (SPLI, 30 September 2018)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758500/20181120-SPLI_FINAL_QTR_REPORT_Jul-Sep18.pdf> (Last accessed 15 May 2021), 1. This document is used because, as noted in the Report, previous SPLI Reports report an inaccurate number of allegations inherited by the SPLI. Additionally, the final IHAT quarterly report presents the number of investigations and cases in relation to the number of victims rather than number of allegations: Iraq Historic Allegations Team (n 3)

were subject to assessment,¹⁰⁷ and the remaining 115 allegations were the subject of 42 investigations.¹⁰⁸ Additionally, in their Final Report on the UK Preliminary Examination, it was stated that of the last investigations being conducted by the SPLI, '71 of 82 allegations were in fact PIL-related'.¹⁰⁹ The fact that more than 20 investigations were ongoing as late as September 2019 raises questions about the reasons why there was an expectation that IHAT would only be conducting 20 investigations by the time of its closure.¹¹⁰

This is especially the case since IHAT had already subjected allegations originating from Public Interest Lawyers to extra filtering processes,¹¹¹ which were subject to criticism by the OTP who stated that 'IHAT and the SPA appear to have placed over-reliance on the SDT's disciplinary findings against Phil Shiner and PIL to terminate lines of criminal inquiry that may have otherwise progressed.'¹¹² The OTP additionally stated that the actions taken by IHAT were 'not the only reasonable course of action in the circumstances'.¹¹³ This serves to create a mixed picture about the extent to which the UK is genuinely willing to conduct investigations because the fact that IHAT did not achieve its expected case load suggests that genuine examinations of past misconduct did take place. On the other hand, the fact that IHAT created an expectation that it would decrease its caseload to such a large extent does raise questions about how PIL allegations were dealt with.

Additionally, the publicly adopted positions of the UK and the OTP in relation to the validity of allegations originating from Public Interest Lawyers appear to be very different. The UK government has stated that Shiner's involvement in the allegations has 'vitiating' them.¹¹⁴ On the other hand, the OTP has stated that:

¹⁰⁷ Service Police Legacy Investigations (n 106) 1

¹⁰⁸ Ibid 1-2

¹⁰⁹ Office of the Prosecutor Final Report (n 11) para 346

¹¹⁰ Service Police Legacy Investigations, 'SPLI Quarterly Update – 1 April 2020 to 30 June 2020' (SPLI, 1 July 2020)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/909154/20200708-SPLI_QTR_RPT-1APR20-30JUN20-FINAL.pdf> (Last accessed 15 May 2021), 2

¹¹¹ Office of the Prosecutor Final Report (n 11) paras 331-32

¹¹² Ibid para 345

¹¹³ Ibid para 349

¹¹⁴ UK Government Response to House of Commons Defence Sub-Committee Report (n 101) 7

“In assessing the credibility of the claims themselves, the Office has taken the position that individual statements received from PIL could be considered credible enough if substantiated with supporting material (such as detention records, medical certificates, photographs, etc.) and/or corroborated by information available from reliable third sources, including human rights reports, the findings of public inquiries in the UK and data pertaining to out-of-court compensation settlements or other relevant material.”¹¹⁵

The OTP took this position even though Kerr noted that the striking off of Phillip Shiner may have served to provide a justification for the OTP to close the preliminary examination into the UK.¹¹⁶ The issue of why IHAT closed is a matter of concern since Ferstman, Hansen and Arajärvi highlight concerns regarding IHAT’s successor organisation because the level of publicly available information provided by the SPLI regarding how it is managing its cases minimal,¹¹⁷ and the work of SPLI does not contribute to the Systemic Issues Working Group in the same way IHAT’s work did.¹¹⁸ Despite all of the above though, the OTP stated that the approach taken by the UK did not serve to demonstrate that they had not complied with the principle of complementarity.¹¹⁹

3. IHAT Inefficiencies

As long as the IHAT/SPLI process has been ongoing, it has been subject to delay. When it entered into operation in November 2010, IHAT was meant to remain open for two years.¹²⁰ 10 years later, the latest SPLI update states that 74 allegations of misconduct in Iraq related to the IHAT process are being

¹¹⁵ 2017 Preliminary Examination Report (n 7) para 191

¹¹⁶ Rachel Kerr, ‘The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice’ in Bergsmo and Stahn (eds) (n 6), 483. Kerr notes at 483, however, that closure of the preliminary examination based on the striking off of Shiner may have left the OTP open to allegations that they have succumbed to external pressure.

¹¹⁷ Ferstman, Hansen and Arajärvi (n 83) 40

¹¹⁸ *ibid* 45

¹¹⁹ Office of the Prosecutor Final Report (n 11) para 350

¹²⁰ HC Deb 1 November 2010 vol 517 col 27WS

investigated.¹²¹ The Courts have acknowledged that delays have been a running theme of the IHAT process with Silber J stating in *Ali Zaki Mousa (No. 2)* that ‘there seems to be a recurring slippage’,¹²² and Leggatt J in *al-Saadoon* stated that IHAT’s progress was ‘disappointing’,¹²³ and that limited progress combined with increases in IHAT’s caseload meant that ‘the situation looks bleak indeed’.¹²⁴ Doubts have also been raised about the extent to which IHAT is efficient: the High Court stated in 2013 that IHAT was not in a position to make decisions regarding prosecutions ‘promptly and efficiently’;¹²⁵ and Leggatt J stated in 2015, ‘I do not doubt the thoroughness with which IHAT is carrying out its work. Whether IHAT is working in the most efficient way is not something for me to say nor am I in a position to judge.’¹²⁶

Investigative inefficiencies are a matter that should be being considered by the OTP as they decide whether the UK has conducted genuine investigations into alleged war crimes in Iraq since Article 17(2)(b) of the Rome Statute states that one of the factors in determining unwillingness exists where ‘there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice’.¹²⁷ Sir David Calvert-Smith’s review of IHAT, when discussing the proposed end date for IHAT of the end of 2019 that existed at the time the report was written in 2016, made it clear that the length of the IHAT process was a matter of concern, stating ‘I venture to suggest that both domestic and international courts would find that end date alarming, although it would of course represent a significant improvement on figures mentioned... in judgments in the Divisional Court’.¹²⁸

¹²¹ Service Police Legacy Investigations (n 110), 2

¹²² *Ali Zaki Mousa (No. 2)* (n 46) para 187

¹²³ *al-Saadoon and others v Secretary of State for Defence* [2015] EWHC 1769 (Admin), para 35

¹²⁴ *ibid*

¹²⁵ *Ali Zaki Mousa (No. 2)* (n 46) para 180

¹²⁶ *al-Saadoon* (n 123) para 38

¹²⁷ Rome Statute (n 63) Article 17(2)(b)

¹²⁸ Sir David Calvert-Smith, ‘Review of the Iraq Historic Allegations Team’ (Attorney General’s Office, 15 September 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553195/Flag_A_-_IHAT_Review_for_Attorney_General_final_12_September.pdf> (Last accessed 15 May 2021), para 13.20

The Calvert-Smith Report found that there were numerous instances in IHAT's workflow where steps could be removed from the process without harming the quality of IHAT's work.¹²⁹ Those particular inefficiencies will not be the focus of this section, however. Instead, this section will briefly discuss two changes to the IHAT process made as a result of the judgment of the High Court in *al-Saadoon* in relation to determining 'whether there is a realistic prospect of obtaining sufficient evidence to charge an identifiable individual with a service offence',¹³⁰ as well as in relation to the information that has to be provided in witness statements by those presenting allegations of wrongdoing to IHAT.¹³¹ This analysis of these measures is required because the reasons why they were introduced serves to further highlight inefficiencies in IHAT.

The evidential test endorsed by the High Court is expressed in the following terms:

"It is appropriate to ask at an early stage whether there is a realistic prospect of obtaining sufficient evidence to charge an identifiable person with a service offence. If it is clear that the answer to the question is "no", there can be no obligation on IHAT to make any further inquiries. In some cases where the answer is not immediately clear, it may well be possible to identify one or more limited investigative steps which, depending on their outcome, may lead to the conclusion that there is no realistic prospect of meeting the evidential sufficiency test. Examples of such steps might be carrying out a documentary search or interviewing the complainant or a key witness. It goes without saying that it will be a

¹²⁹ See, for example, *ibid* para 6.3, in relation to removing the requirement that the Provost Marshal (Navy) in the assignment of cases to IHAT; *ibid* paras 7.15 and 7.17 regarding the sifting process during the pre-investigation stage of IHAT investigations in relation to ill-treatment allegations and para 8.6 in relation to allegations of unlawful killing; *ibid* paras 7.19 and 8.7 in relation to the practice that all lawyers in the Iraq Historic Allegations Prosecution Team are involved in the assessment of cases rather than making decisions individually; and *ibid* para 13.9 which suggested that the use of video conferencing of witnesses could be used in appropriate circumstances rather than relying on in-person interviews.

¹³⁰ *al-Saadoon and others v Secretary of State for Defence* [2016] EWHC 773 (Admin) para 283

¹³¹ *ibid* para 289

matter for the judgment of the Director of IHAT in any particular case how the test formulated by the DSP is applied.”¹³²

The approval of this test, which was described as ‘a positive move’ in the Calvert-Smith Report,¹³³ was welcomed by Director of Service Prosecutions Andrew Cayley who stated that ‘it gave judicial backing to the elimination of the many hundreds of cases where there was really no prospect whatsoever of developing a case where you could charge an identifiable individual with a service offence’.¹³⁴

If it was the case that hundreds of allegations of misconduct by UK personnel could be eliminated through the use of this evidential test, it has to be asked why such a test was not adopted earlier. In *Ali Zaki Mousa (No. 2)*, the Court stated that the DSP should be ‘involved in making a decision at the outset of each case involving death referred to IHAT as to whether prosecution was a realistic prospect’.¹³⁵ The Court also stated that the DSP should have a similar involvement in relation to cases of alleged ill-treatment.¹³⁶ This statement was acknowledged by the Court in *al-Saadoon*, prior to endorsing the test, where it was stated that whilst there had increased involvement of the Service Prosecution Authority in the IHAT process, the involvement of the DSP and SPA in IHAT had not been what was previously anticipated by the High Court.¹³⁷ Exactly why this is the case is unclear because Andrew Cayley stated that the involvement of the SPA in IHAT had benefits for IHAT’s case management process, not only in relation to cases where prosecutions could be brought but also in those where there was no such prospect.¹³⁸ This should also have been a priority in light of the fact that the DSP acknowledged that, in some cases, the information provided by claimants varied as the investigative process went on.¹³⁹ This is also the case since, as will be discussed in more detail

¹³² *ibid* para 283

¹³³ Calvert-Smith Report (n 128) para 12.3

¹³⁴ Cayley (n 6) 58

¹³⁵ *Ali Zaki Mousa (No. 2)* (n 46) para 182

¹³⁶ *ibid* para 228

¹³⁷ *al-Saadoon* (n 130) para 276

¹³⁸ Cayley (n 6) 53

¹³⁹ *al-Saadoon* (n 130) para 286

below, the circumstances which led to the High Court taking action in relation to witness statements involved IHAT using resources to examine allegations that didn't necessarily allege any criminality.

In relation to witness statements, the High Court in *al-Saadoon* stated that:

“I consider that IHAT can as a general rule properly decline to investigate... an allegation unless it is supported by a witness statement which is (i) signed by the claimant, (ii) gives the claimant's own recollection of the relevant events, (iii) identifies any other relevant witness known to the claimant and the gist of the evidence which the witness may be able to give, and (iv) explains what, if any, steps have been taken or attempts made since the incident to bring it to the attention of British authorities.”¹⁴⁰

The Court also explained that IHAT could still choose to investigate an allegation absent such a witness statement.¹⁴¹ This witness statement requirement was designed to remedy a situation raised by the Director of IHAT, Mark Warwick, in October 2015 that since August 2014 Public Interest Lawyers had been providing far less information to IHAT to support claims than had previously been the case:

“Mr Warwick explained that the early claims forwarded to IHAT by PIL usually included letters of claim sent under the judicial review pre-action protocol and a first witness statement from the claimant. This information enabled investigators to identify the date and location of the alleged incident and relevant witnesses and to conduct searches for relevant military records. Since August 2014, however, the only information supplied when claims have been notified to IHAT has generally been the claim summary prepared for the purpose of adding the claim to the register. The summary typically contains much less information than was

¹⁴⁰ *ibid* para 289

¹⁴¹ *ibid* para 290

previously provided, leading to a corresponding increase in the amount of work that IHAT has to do at the outset of the process. This in turn causes delay and adds significantly to the work involved in making preliminary assessments of allegations.”¹⁴²

The Deputy Director of IHAT, Commander Hawkins, in evidence to the Defence Sub-Committee, stated that ‘a lot of these allegations did not outline a criminal offence – they did not even mention a criminal offence – but they came to us for assessment.’¹⁴³ The decrease in information made available to IHAT also came at a time when the IHAT caseload increased dramatically as Mark Warwick stated that 3000 allegations were referred to IHAT between July 2014 and September 2015.¹⁴⁴

Whilst it is not possible to know whether IHAT’s use of resources to overcome the lack of information provided to them by those presenting allegations of wrongdoing meant that investigations into credible allegations of misconduct in Iraq were fatally hampered, IHAT already had a difficult mandate to fulfil. It had to act in situations where there may be only limited evidence available;¹⁴⁵ where a large amount of time had passed, the Calvert-Smith Report noted, at that point, the most recent allegations of unlawful killing took place almost a decade earlier;¹⁴⁶ and investigations are, to use the words of Leggatt J, ‘a time-consuming process’.¹⁴⁷ It would surely have been better to address the issues posed by decreased levels of information earlier, especially since the High Court had already expressed concerns about delays in the IHAT process. The Designated Judge, Leggatt J, even stated during the time that IHAT was receiving a reduced level of information that:

“It seems to me essential, given the large number of cases recently added to its caseload, that IHAT should continue to develop processes

¹⁴² *ibid* para 284

¹⁴³ House of Commons Defence Sub-Committee, Oral evidence 15 November 2016 (n 100) Q477

¹⁴⁴ *ibid* Q475

¹⁴⁵ Cayley (n 6) 58

¹⁴⁶ Calvert-Smith Report (n 128) para 13.19

¹⁴⁷ *al-Saadoon* (n 123) para 37

for sifting cases so as to identify those involving the most serious allegations to which priority needs to be given and also to identify at as early a stage as possible those cases where there is no credible allegation that an unlawful killing or ill-treatment amounting to a serious criminal offence occurred, and which it is therefore not necessary for IHAT to investigate.”¹⁴⁸

Acting earlier may also have served to prevent the possibility that victims of alleged mistreatment were unable to present their allegations as Ferstman, Arajärvi and Hansen state one of the consequences of the closure of Public Interest Lawyers is that many of its clients were left without legal representation and would find it difficult to amend witness statements.¹⁴⁹ The OTP ultimately found, however, that the IHAT process had not been subject to unjustifiable delays,¹⁵⁰ and that the two tests adopted by the High Court ‘appear reasonable in the circumstances’.¹⁵¹

4. Allegations of Cover-ups and MoD Attempts to Stop IHAT Investigations

In November 2019, The Sunday Times and BBC Panorama jointly reported allegations that IHAT had found that members of the UK armed forces were responsible for the mischaracterisation of the circumstances surrounding the deaths of a number of detainees in Iraq, and that investigations conducted by IHAT were being shut down prematurely as a result of pressure from the MoD.¹⁵²

For example, the reporting states that when approached by IHAT, an alleged eyewitness to the killing of Raid al-Mosawi, which had been characterised as a death which occurred in self-defence, stated that they were not actually an

¹⁴⁸ *ibid* para 39

¹⁴⁹ Ferstman, Hansen and Arajärvi (n 83) 30

¹⁵⁰ Office of the Prosecutor (n 11) para 433

¹⁵¹ *ibid* para 312

¹⁵² Insight, ‘Revealed: the evidence of war crimes ministers tried to bury’ (*The Sunday Times*, 17 November 2019) <<https://www.thetimes.co.uk/article/revealed-the-evidence-of-war-crimes-ministers-tried-to-bury-6x2fb63ts>> (Last accessed 15 May 2021)

eyewitness to the offence at all.¹⁵³ Additionally, in relation to the death of Radhi Nama at Camp Stephen in May 2003, IHAT investigators found that Nama had suffered multiple injuries as a result of mistreatment and that ‘a letter arrived from a senior officer saying Nama had suffered a heart attack and suggesting the family check on him at the hospital. In fact, a soldier had taken his body to the morgue two days before.’¹⁵⁴ Another death resulting from alleged mistreatment by British forces at Camp Stephen, that of Mousa Ali, occurred just a matter of days later.¹⁵⁵ Former Director of Public Prosecutions, Lord Macdonald, said of allegations in relation to Camp Stephen that ‘the evidence suggests that many crimes witnessed there were not spontaneous, but sanctioned at senior levels’.¹⁵⁶ In relation to IHAT inquiries, one IHAT investigator stated ‘Cases were being shut down against the wishes of senior investigating officers’,¹⁵⁷ and another investigator stated that IHAT was ‘a failure of the British justice system’.¹⁵⁸

In the immediate aftermath of these allegations, the OTP stated that they ‘appear on their face highly relevant to its assessment of the genuineness of national proceedings’.¹⁵⁹ The Ministry of Defence denied the claims made by The Sunday Times and BBC Panorama with a spokesperson stating that ‘throughout the process the decisions of prosecutors and the investigators have been independent of the MoD and involved external oversight and legal advice.’¹⁶⁰

¹⁵³ Insight, ‘British Army major ‘faked witness testimony to coverup killing of Iraqi policeman’ (*The Sunday Times*, 17 November 2019) <<https://www.thetimes.co.uk/article/british-army-major-faked-witness-testimony-to-cover-up-killing-of-iraqi-policeman-mczl8dpg5>> (Last accessed 15 May 2021)

¹⁵⁴ Insight, ‘Revealed: the evidence of war crimes ministers tried to bury’ (n 152)

¹⁵⁵ *ibid*

¹⁵⁶ Ken Macdonald, ‘Cover-ups and crime thrive when soldiers who do wrong escape justice’ (*The Sunday Times*, 17 November 2019) <<https://www.thetimes.co.uk/article/cover-ups-and-crime-thrive-when-soldiers-who-do-wrong-escape-justice-hdbbkqd8j>> (Last accessed 15 May 2021)

¹⁵⁷ Insight, ‘Revealed: the evidence of war crimes ministers tried to bury’ (n 152)

¹⁵⁸ *ibid*

¹⁵⁹ OTP 2019 Preliminary Examination Report (n 7) para 170

¹⁶⁰ Ministry of Defence, ‘Ministry of Defence response to allegations relating to the conduct of UK forces in Iraq and Afghanistan’ (Ministry of Defence, 17 November 2019) <<https://www.gov.uk/government/news/ministry-of-defence-response-to-allegations-relating-to-the-conduct-of-uk-forces-in-iraq-and-afghanistan>> (Last accessed 15 May 2021)

In the House of Commons, the Minister for Defence People and Veterans, Johnny Mercer, went further in the criticism of the reporting presented by The Sunday Times and BBC Panorama, stating that the basis of the allegations were inaccurate:

*“The Sunday Times and the BBC assert that the closure of IHAT was intended to ensure that alleged war crimes in Iraq went unpunished... Factually, they cite two cases in support of this wholly untenable position: the shooting of an off-duty Iraqi policeman and the deaths of Radhi Nama and Abdul Jabar Mousa Ali at Camp Stephen. In fact, both cases were taken over by SPLI when IHAT closed. SPLI’s investigations into both cases only finished in early 2019. This means that the information that forms the basis of comments by former IHAT investigators and by Lord MacDonald... was incomplete and at least two years out of date.”*¹⁶¹

It should however be noted that in their final report, the OTP stated that ‘It has been confirmed to the Office that Lord Macdonald had sight of the documentation which was used to support the referral to the SPA’.¹⁶²

The fact that these allegations exist at all should be concerning to any observer of the UK’s investigative efforts, and the OTP is right to assess whether the allegations have any impact on their preliminary examination.¹⁶³ This is especially important since Article 17(1)(b) of the Rome Statute states that cases are inadmissible before the ICC if a State chooses genuinely not to bring a prosecution.¹⁶⁴ In their final report, the OTP noted that the information they received from former IHAT personnel ‘corresponds to the reports made in the BBC Panorama programme and in the Sunday Times’,¹⁶⁵ but concluded that they could not find sufficient evidence to justify a finding that allegations had been covered up,¹⁶⁶ or closed as a result of political pressure.¹⁶⁷

¹⁶¹ HC Deb 7 January 2020 vol 669 col 663

¹⁶² Office of the Prosecutor Final Report (n 11) 145

¹⁶³ This is a sentiment shared by the OTP: *ibid* para 412

¹⁶⁴ Rome Statute (n 63) Article 17(1)(d)

¹⁶⁵ Office of the Prosecutor Final Report (n 11) para 408

¹⁶⁶ *ibid* para 409

¹⁶⁷ *ibid* para 411

5. Conclusion

This Chapter has served to highlight a number of concerns with how the UK managed the process designed so that ‘investigations are carried out thoroughly and expeditiously, so that – one way or another – the truth behind them is established’ in relation to the extent to which IHAT was subject to political pressure, delays and allegations of cover ups.¹⁶⁸ Additionally, it has also been shown that IHAT has been subject to challenges in relation to whether it was able to conduct independent investigations. The very fact that these concerns exist raises significant questions about the extent to which the UK has been committed to the idea of criminal accountability. The OTP has even gone as far as to state that ‘the UK government, and in particular the MoD have at best been reluctant, if not at times hostile, partners to pursuing claims of criminal responsibility against members of UK armed forces.’¹⁶⁹ This is also a concern since, as referred to earlier, representatives of the UK government stated the importance of IHAT to the preliminary examination process. However, what is perhaps more alarming is that the OTP have identified several relating to the IHAT process, some of which have been discussed in this Chapter,¹⁷⁰ but still determined that the approach taken by IHAT was not inconsistent with the UK’s obligations under the principle of complementarity. This serves to raise significant questions about the future application of the principle of complementarity.

¹⁶⁸ HC Deb 1 March 2010 vol 506 cols 93WS-94WS

¹⁶⁹ Office of the Prosecutor Final Report (n 11) para 461

¹⁷⁰ For a further example of where concerns are raised by the OTP in their final report, see *ibid* paras 351-63 regarding proportionality criteria applied by IHAT.

Chapter Eight: The Overseas Operations (Service Personnel and Veterans) Bill

This Chapter, which is the final chapter discussing how the United Kingdom has addressed allegations of misconduct in relation to the armed conflict in Iraq, will discuss the criminal law provisions found within Part 1 of the Overseas Operations (Service Personnel and Veterans) Bill. This Bill, in the government's own words, seeks to:

“introduce a presumption that once five years have elapsed from the date of an incident, it will be exceptional for a prosecutor to determine that a service person or veteran should be prosecuted for alleged offences on operations outside the UK. The Bill will create a new ‘triple lock’ in order to give service personnel and veterans greater certainty, including obtaining the consent of the Attorney General before a prosecution can proceed.”¹

This Bill has been defended by government ministers with Defence Secretary Ben Wallace stating that it will ‘protect our veterans against repeated reinvestigations’,² and Minister for Defence People and Veterans Johnny Mercer stated that it would ‘deal with the threat of prosecution for alleged historical offences many years after the event’.³ However, it has been the subject of criticism from across the political spectrum, including by a former Defence Secretary and Attorney General.⁴ The Bill has also been criticised by

¹ Ministry of Defence, Johnny Mercer and Ben Wallace, ‘Armed Forces protected from vexatious claims in important step’ (Ministry of Defence, 18 March 2020)

<<https://www.gov.uk/government/news/armed-forces-protected-from-vexatious-claims-in-important-step>> (Last accessed 15 May 2021)

² *ibid*

³ HC Deb 23 September 2020 vol 680 col 1049

⁴ See, for example, Dominic Grieve, ‘Military prosecutions bill creates more problems than it fixes’ (*The Times*, 26 March 2020) <<https://www.thetimes.co.uk/article/military-prosecutions-bill-creates-more-than-problems-than-it-fixes-dn2t3zcld>> (Last accessed 15 May 2021); Dan Sabbagh, ‘Labour calls for halt to bill shielding UK soldiers from prosecution’ (*The Guardian*, 25 August 2020) <<https://www.theguardian.com/law/2020/aug/25/labour-calls-for-halt-of-bill-shielding-uk-soldiers-from-prosecution>> (Last accessed 15 May 2021); David Davis, ‘Plan to excuse past torture by soldiers is a grave mistake’ (*The Times*, 21 September 2020) <<https://www.thetimes.co.uk/article/plan-to-excuse-past-torture-by-soldiers-is-a-grave-mistake-5pgztx7bb>> (Last accessed 15 May 2021); Dan Sabbagh, ‘Rifkind criticises bill to restrict British soldier torture prosecutions’ (*The Guardian*, 21 September 2020)

numerous non-governmental organisations,⁵ senior military figures,⁶ and the former Director of Service Prosecutions Bruce Houlder stated that the notion of implementing the presumption against prosecution ‘is really outrageous’.⁷ Additionally, the International Criminal Court Office of the Prosecutor (OTP) has expressed concern about the implementation of the Bill, arguing that ‘The effect of applying a statute of limitations to block further investigations and prosecution of crimes alleged committed by British service members in Iraq would be to render such cases admissible before the ICC’.⁸

<<https://www.theguardian.com/uk-news/2020/sep/21/malcolm-rifkind-criticises-bill-restrict-british-soldiers-tried-torture>> (Last accessed 15 May 2021); Joanna Cherry, ‘Joanna Cherry: Decriminalising torture does our soldiers a disservice’ (*The Herald*, 22 September 2020) <<https://www.heraldscotland.com/news/18736205.joanna-cherry-decriminalising-torture-soldiers-disservice/>> (Last accessed 15 May 2021); Dan Jarvis, ‘The Overseas Operations Bill is damaging to both our troops and our international standing’ (The House, 23 September 2020) <<https://www.politicshome.com/thehouse/article/overseas-operations-bill-is-damaging-to-both-our-troops-and-our-international-standing>> (Last accessed 15 May 2021)

⁵ See, for example, Amnesty International and Others, ‘Joint Response to UK government plans not to prosecute acts of torture after five years’ (REDRESS, 18 March 2020)

<<https://redress.org/news/joint-response-to-uk-government-plans-not-to-prosecute-acts-of-torture-after-five-years/>> (Last accessed 15 May 2021); Chris Esdaile, ‘Overseas Operations Bill: True Freedom Requires the Rule of Law and Justice’ (REDRESS, 17 June 2020)

<<https://redress.org/news/overseas-operations-bill-true-freedom-requires-the-rule-of-law-and-justice/>> (Last accessed 15 May 2021); Liberty, ‘Liberty: The Overseas Operations Bill is Bad News for Soldiers and Civilians Alike’ (Liberty, 23 September 2020)

<<https://www.libertyhumanrights.org.uk/issue/liberty-the-overseas-operations-bill-is-bad-news-for-soldiers-and-civilians-alike/>> (Last accessed 15 May 2021); Amnesty International UK, ‘UK: Military prosecutions bill will have a “devastating impact on reputation of armed forces”’ (Amnesty International UK, 18 March 2020)

<<https://www.amnesty.org.uk/press-releases/uk-military-prosecutions-bill-will-have-devastating-impact-reputation-armed-forces>> (Last accessed 15 May 2021); Centre for Military Justice, ‘Don’t believe the hype. Service Personnel must be bound by – and protected by – the Human Rights Act’ (Centre for Military Justice, 18 March 2020) <<https://centreformilitaryjustice.org.uk/dont-believe-the-hype-service-personnel-must-be-bound-by-and-protected-by-the-human-rights-act/>> (Last accessed 15 May 2021)

⁶ Charles Guthrie, ‘Don’t give wriggle room to torturers’ in Letters to the Editor, ‘Letters to the Editor: EU double standard on trade deal talks’ (*The Sunday Times*, 7 June 2020)

<<https://www.thetimes.co.uk/article/letters-to-the-editor-eu-double-standard-on-trade-deal-talks-b3p2tkgq6>> (Last accessed 15 May 2021); Freedom from Torture, ‘Senior military officials write to the Prime Minister’ (Freedom from Torture, 18 September 2020)

<<https://www.freedomfromtorture.org/news/senior-military-officials-write-to-the-prime-minister>> (Last accessed 15 May 2021); Nicholas Mercer, ‘The UK government is attempting to bend the rules on torture’ (*The Guardian*, 20 September 2020)

<<https://www.theguardian.com/commentisfree/2020/sep/20/overseas-operations-bill-uk-government-bend-rules-torture-soldiers>> (Last accessed 15 May 2021)

⁷ Helen Warrell, ‘Former army chiefs attack UK move to limit torture prosecutions’ (*Financial Times*, 22 September 2020) <<https://www.ft.com/content/e68a174d-30c7-49af-be40-b6244f1fcbaf>> (Last accessed 15 May 2021)

⁸ Office of the Prosecutor, ‘Situation in Iraq/UK: Final Report’ (International Criminal Court, 9 December 2020) <<https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>> (Last accessed 15 May 2021), para 479. The OTP had previously stated that if enacted, ‘the Office would need to consider its potential impact on the ability of the UK authorities to investigate and/or prosecute crimes allegedly committed by members of the British armed forces in Iraq’: Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2019’ (International Criminal Court, 5 December 2019) <<https://www.icc->

This Bill is likely to have, at most, a limited impact on the prosecution of alleged offences taking place in Iraq, since only 74 allegations were the subject of investigations as a part of the Service Personnel Legacy Investigation (SPLI) process as of 30 June 2020,⁹ and the Bill only applies to prosecution decisions made after the Bill enters into law.¹⁰ However, it is clear that the Bill would still, in theory, apply to allegations of misconduct in Iraq. Bill Minister Johnny Mercer stated the following in this respect:

“The statutory presumption... will only apply to proceedings that start after the Bill has become law. Although alleged criminal offences relating to operations in Iraq and Afghanistan occurred more than five years ago, meaning that the presumption could be applied in any relevant prosecutorial decisions, it is likely that any remaining investigations of those allegations will be complete before the Bill becomes law. If any new credible allegations relating to Iraq and Afghanistan should arise, however, they will obviously be subject to investigation and, where appropriate, consideration by a prosecutor. Any decision to prosecute such a case after the Bill has become law must, in accordance with the presumption, be exceptional.”¹¹

It is also clear that the experience of allegations raised in the context of the conflict in Iraq have influenced the government’s decision to introduce the Bill.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919822/20190718-MOD_consultation_document-FINAL.pdf (Last accessed 15 May 2021), para 174. These comments were made in relation to a consultation process launched by the UK government in July 2019 which included a proposal for a year presumption against prosecution after 10 years, rather than after 5 years: Ministry of Defence, ‘Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom’ (Ministry of Defence, 22 July 2019)

⁹ Service Police Legacy Investigations, ‘SPLI – Quarterly Update – 1 April 2020 to 30 June 2020’ (Service Police Legacy Investigations, 1 July 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/909154/20200708-SPLI_QTR_RPT-1APR20-30JUN20-FINAL.pdf (Last accessed 15 May 2021). SPLI’s caseload of 74 allegations outstanding constitutes a significant reduction compared to the 1280 allegations that the SPLI has received.

¹⁰ Overseas Operations (Service Personnel and Veterans) HC Bill (2019-21) [117] cl 15(6)

¹¹ Overseas Operations (Service Personnel and Veterans) Bill Deb 14 October 2020 cols 193-94

When announcing the launch of the consultation preceding the Bill, then Defence Secretary Penny Mordaunt stated that the government ‘wants not to repeat the type of situation that has evolved under the Iraq Historical Allegations Team’,¹² and that the IHAT process ‘was hijacked by unscrupulous lawyers’ before going on to refer to the impact of Phil Shiner and Public Interest Lawyers.¹³ Additionally, in the context of the Bill’s Second Reading Debate in the House of Commons, Mallory states that ‘the central villain was clear – Phil Shiner and the, now disbanded, Public Interest Lawyers’,¹⁴ though Mallory also notes that ‘looking beyond the activities of this one firm, there was a clear narrative advanced that all members of the legal profession who pursued claims against the military or state were equally disgraced.’¹⁵

The purpose of this Chapter will therefore to be to discuss whether this Bill indicates whether the UK is willing to conduct investigations or prosecutions for offences, such as those which allegedly took place in Iraq, where they occurred in the context of overseas operations more than five years ago. This will be done by examining the clauses contained within Part 1 of the Overseas Operations (Service Personnel and Veterans) Bill in turn.

1. The Presumption against Prosecution: Clauses 1 to 4

Under Clauses 1 and 2 of the Bill, it is stated that a prosecution shall only be launched, or continued, in relation to crimes committed by members of the armed forces in the context of an overseas operation more than five years ago in exceptional circumstances.¹⁶

¹² Penny Mordaunt, ‘Legal Protections and Support for Armed Forces Personnel and Veterans’ (UK Parliament, 21 May 2019) <<https://questions-statements.parliament.uk/written-statements/detail/2019-05-21/HCWS1575>> (Last accessed 15 May 2021)

¹³ *ibid*

¹⁴ Conall Mallory, ‘Folk Heroes, Villains and the Overseas Operations Bill’ (UK Human Rights Blog, 12 October 2020) <<https://ukhumanrightsblog.com/2020/10/12/folk-heroes-villains-and-the-overseas-operations-bill-conall-mallory/>> (Last accessed 15 May 2021)

¹⁵ *ibid*

¹⁶ Overseas Operations (Service Personnel and Veterans) Bill (n 10) cls 1-2. The Bill states in clause 1(6), ‘In this Part “overseas operations” means any operation outside the British Islands, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which members of Her Majesty’s forces come under attack or face the threat of attack or violent resistance.’

When reaching this decision, under Clause 3 of the Bill, prosecutors will be required to consider two factors ‘so far as they tend to reduce the person’s culpability or otherwise tend against prosecution’.¹⁷ The first of these factors is:

“the adverse effect (or likely adverse effect) on the person of the conditions the person was exposed to during deployment... including their experiences and responsibilities (for example, being exposed to unexpected or continuous threats, being in command of others who were so exposed, or being deployed alongside others who were killed or severely wounded in action”¹⁸

When weighing up this factor, the prosecutor is also required to ‘have regard to the exceptional demands and stresses to which members of Her Majesty’s forces are likely to be subject while deployed on overseas operations, regardless of their length of service, rank or personal resilience.’¹⁹ The second requirement which must be considered is the ‘public interest in finality’ which applies ‘where there has been a relevant previous investigation and no compelling new evidence has become available’.²⁰

The inclusion of a presumption against prosecution after five years within the Bill has been the subject of criticism on the basis that it amounts to an effective statute of limitations for crimes that took place more than five years ago. For example, the Equality and Human Rights Commission in a briefing ahead of the Bill’s Second Reading in the House of Commons stated that ‘the proposed ‘presumption against prosecution’ amounts to a statute of limitations’.²¹ The Law Society stated that the presumption constitutes ‘a quasi-statute of limitations

¹⁷ Ibid cl 3(1)

¹⁸ Ibid cl 3(2)(a). The term ‘adverse effect’ is defined in cl 3(4).

¹⁹ Ibid cl 3(3)

²⁰ Ibid cl 3(2)(b)

²¹ Equality and Human Rights Commission, ‘Briefing: Overseas Operations (Service Personnel and Veterans) Bill House of Commons, Second Reading’ (Equality and Human Rights Commission, September 2020)

<https://www.equalityhumanrights.com/sites/default/files/parliamentary-briefing-overseas-operations-bill-house-of-commons-second-reading-september-2020_0.docx> (Last accessed 15 May 2021), 4

and would likely lead to some meritorious prosecutions not being brought'.²² A group of United Nations human rights experts also stated that:

“By introducing a statutory presumption against prosecution and statutes of limitations, this bill undermines the absolute and non-derogable nature of the prohibition of torture and violates human rights law, as well as international criminal and human rights law.”²³

A discussion of the Bill’s compatibility with international law will be conducted in the final section of this Chapter examining the offences which the presumption against prosecution will apply to.

The government has defended the Bill from these accusations, with Defence Secretary Ben Wallace arguing that:

“The Bill is about doing the right thing by our troops. Our soldiers and values must uphold the highest international standards. The Bill is not an amnesty, a statute of limitation or the decriminalisation of erroneous acts. We will continue to protect the independence of our prosecutors and our service police, and we will investigate, and if necessary, prosecute service personnel who break the law. But what we will not accept is the vexatious hounding of veterans and our armed forces by ambulance-chasing lawyers motivated not by the search for justice, but by their own crude financial enrichment.”²⁴

²² Law Society, ‘Parliamentary briefing Overseas Operations (Service Personnel and Veterans) Bill – House of Commons second reading’ (Law Society, 23 September 2020) <<https://www.lawsociety.org.uk/topics/human-rights/parliamentary-briefing-overseas-operations-bill-house-of-commons-second-reading>> (Last accessed 20 March 2021)

²³ Office of the High Commissioner for Human Rights, ‘UK Parliament must not introduce impunity for war crimes, say UN experts’ (Office of the High Commissioner for Human Rights, 5 October 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26342&LangID=E>> (Last accessed 15 May 2021)

²⁴ HC Deb 23 September 2020 vol 680 col 992

Additionally, Johnny Mercer has stated that ‘there is no time bar on any of the offences in the Bill’,²⁵ and that ‘in the circumstances where our service personnel fall short of the high standards of personal behaviour and conduct that is expected of them, it is vital they are held to account.’²⁶

However, it is unclear what the precise basis for introducing a presumption against prosecutions for service personnel and veterans is. Wallace states that ‘this presumption against prosecution legislation is a solution in search of a problem’ because there have been very few prosecutions in relation to the offences which would be subject to the presumption against prosecution even in circumstances where there is evidence of criminality.²⁷ This is brought further into focus by the fact that in evidence to the Joint Committee on Human Rights, Johnny Mercer was unable to name a single example of a vexatious prosecution has been brought,²⁸ and the government stated in the Bill’s impact assessment that ‘it is not possible to estimate how many potential future prosecutions will not proceed as a result of the statutory presumption against prosecution measure’.²⁹ Additionally, in evidence to the Joint Committee on Human Rights, Damian Parmenter, the Director of the Defence and Security Industrial Strategy at the Ministry of Defence, noted that there have only been 27 prosecutions brought against service personnel for ‘an offence committed against a local national in Afghanistan or Iraq’ and that they were all brought within 26 months of the alleged offence taking place.³⁰

²⁵ *ibid* col 1050

²⁶ Overseas Operations (Service Personnel and Veterans) Bill Deb 14 October 2020 col 183

²⁷ Stuart Wallace, ‘Written evidence from Dr Stuart Wallace (OOB0009)’ (Joint Committee on Human Rights, 8 September 2020)

<<https://committees.parliament.uk/writtenevidence/11248/pdf>> (Last accessed 15 May 2021), para 3

²⁸ Joint Committee on Human Rights, ‘Oral evidence: The Overseas Operations Service Personnel and Veterans) Bill, HC 665’ (Houses of Parliament, 5 October 2020)

<<https://committees.parliament.uk/oralevidence/985/pdf/>> (Last accessed 15 May 2021), Q16

²⁹ Ministry of Defence, ‘Overseas Operations (Service Personnel and Veterans) Bill: Impact Assessment’ (Ministry of Defence, 25 August 2020)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918954/Impact-assessment-OO_SPV__Bill-_Final__002_.pdf> (Last accessed 15 May 2021), 8

³⁰ Joint Committee on Human Rights (n 28) Q16. See also, Ministry of Defence, ‘Letter, dated 3 November 2020, to Roseanne Burke, CEASEFIRE’, available at <https://www.ceasefire.org/wp-content/uploads/2020/12/FOI2020_06821-Response-V2.pdf> (Last accessed 15 May 2021)

On this basis, it is difficult to disagree with Wallace’s notion that the Bill is addressing a problem that doesn’t need to be solved.³¹ This is further emphasised by the OTP in their Final Report on the UK Preliminary Examination as they stated that ‘the impact of SDT’s findings against Phil Shiner/PIL in justifying the need to introduce legislation aimed at curbing the phenomena of vexatious litigation has been considerably exaggerated.’³²

A number of commentators have also criticised the UK government for not focusing on the issues caused by a lack of contemporaneous investigations conducted in relation to the alleged criminality of members of the UK armed forces. For example, the Centre for Military Justice state that ‘the Bill is completely silent’ on the issue of preventing repeated investigations.³³ Goodwin-Hudson argued that the Bill ‘does not address the root cause of the problem, namely that the MOD does not appear to prioritise, nor have the mechanisms in place, to conduct timely, independent or effective investigations into allegations of civilian harm’.³⁴ Liberty additionally highlight that the failure of the UK to conduct timely investigations is what causes the major discrepancies between when an offence was committed and when any prosecution takes place,³⁵ and that:

“most repeat investigations or delayed prosecutions in recent years have been the direct result of failures by the MoD itself. Rather than put forward proposals which tackle the real reason behind any repeat investigations or delayed prosecutions, this Bill instead proposes

³¹ Wallace (n 27) para 3

³² OTP Final Report (n 8) para 474

³³ Centre for Military Justice, ‘Written evidence from the Centre for Military Justice (OOB0017)’ (Joint Committee on Human Rights, 11 September 2020) <<https://committees.parliament.uk/writtenevidence/11552/pdf>> (Last accessed 20 March 2021), para 8. For a discussion of the issue of investigations see paras 1-8.

³⁴ Mark Goodwin-Hudson, ‘Written evidence from Mark Goodwin-Hudson (OOB022)’ (Joint Committee on Human Rights, 11 September 2020) <<https://committees.parliament.uk/writtenevidence/11592/pdf>> (Last accessed 15 May 2021), para 2

³⁵ Liberty, ‘Liberty’s Submission to the Joint Committee on Human Rights’ Inquiry into the Overseas Operations (Service Personnel and Veterans) Bill’ (Liberty, September 2020) <<https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/02/LIBERTY-SUBMISSION-JCHR-INQUIRY-INTO-THE-OVERSEAS-OPERATIONS-BILL-SEPTEMBER-2020.pdf>> (Last accessed 15 May 2021), para 8

unprecedented and dangerous legal protections which will create a legal regime that mandates impunity for serious offences and inequality before the law for victims of abuse and Armed Forces personnel.”³⁶

The former Judge Advocate General, Jeff Blackett, also questions the Bill’s focus on prosecutions and its ability to fulfil its stated aim of preventing repeat investigations:

“The Bill is effectively looking at the wrong end of the telescope. It is looking at the prosecution end, and you have got to remember that you do not prosecute until you investigate – and you have got to investigate. This will not stop people being investigated and it will not stop people being re-investigated and investigated again. Lots of investigations do not go anywhere, but the people who are investigated do not see that.”³⁷

The Bill’s lack of focus on the investigatory process has also been noted by several MPs during the Bill’s progress through the House of Commons.³⁸

However, it has been noted by a critic of the Bill, Clive Baldwin, the Senior Legal Advisor at Human Rights Watch that reform to the investigation process ‘would be better done in a wholesale reform of the military criminal justice system’.³⁹ The government has acknowledged that the issue of investigations does need to be improved, and on 13 October 2020, Defence Secretary Ben Wallace stated that ‘there should be timely consideration of serious and credible allegations and, where appropriate, a swift and effective investigation followed

³⁶ *ibid* para 12

³⁷ Overseas Operations (Service Personnel and Veterans) Bill Deb 8 October 2020 col 120

³⁸ See, for example, the Chair of the Intelligence and Security Committee, Julian Lewis, at HC Deb 23 September 2020 vol 680 cols 987-88; Lloyd Russell-Moyle at cols 993-94; Stewart Malcolm McDonald at col 1001; Dan Jarvis at col 1009; and Gavin Robinson at col 1022

³⁹ Overseas Operations (Service Personnel and Veterans) Bill Deb 6 October 2020 col 72. Baldwin had previously stated that ‘if passed, the bill would greatly increase the risk that British soldiers who commit serious crimes will avoid justice’: Clive Baldwin, ‘UK Bill a License for Military Crimes?’ (Human Rights Watch, 20 March 2020) <<https://www.hrw.org/news/2020/03/20/uk-bill-license-military-crimes>> (Last accessed 15 May 2021). Additionally, the Director of Liberty, Martha Spurrier, stated that even if the Bill were to include a focus on investigations, this would not fix the flaws of the bill: Overseas Operations (Service Personnel and Veterans) Bill Deb 6 October 2020 col 72.

by prosecution, if warranted'.⁴⁰ To this end, Wallace announced a review into how military justice investigations are conducted.⁴¹

The question, however, is why the government chose to attempt to implement a presumption against prosecution when it is not clear that there have been any vexatious prosecutions, and that where prosecutions have taken place they have taken place well ahead of the five year period after which the presumption against prosecution would come into force, and which does not necessarily affect the investigation process – Mercer acknowledged that 'the presumption will not directly impact on investigations'.⁴² It seems difficult to explain that the presumption against prosecution does not amount to an unwillingness to prosecute if the Bill does not fulfil its aims of preventing a cycle of reinvestigation or stopping vexatious prosecutions. If it is the case that the government is unwilling to conduct prosecutions, it appears likely that the following assessment of the Bill by Judge Blackett is correct:

“What this Bill does is exactly the opposite of what it is trying to do. What it is trying to do is to stop ambulance-chasing solicitors and vexatious and unmeritorious claims... What it actually does is increase the risk of service personnel appearing before the International Criminal Court.”⁴³

In their 2019 Preliminary Examination Report, published more than three months before the publication of the Overseas Operations Bill, the OTP stated that they would have to consider the impact of the implementation of a presumption against prosecution as a part of their complementarity assessment.⁴⁴ It is questionable therefore why the government would seek to introduce any legislation that could be perceived to limit the potential for investigations or prosecutions especially when, as discussed in the previous chapter's discussion of the Iraq Historic Allegations Team, the government has already been subject to allegations of political interference in the criminal

⁴⁰ HC Deb 13 October 2020 vol 682 col 9WS

⁴¹ *ibid*

⁴² Overseas Operations (Service Personnel and Veterans) Bill Deb 14 October 2020 col 193

⁴³ Overseas Operations (Service Personnel and Veterans) Bill Deb 8 October 2020 cols 117-18

⁴⁴ OTP 2019 Preliminary Examination Report (n 8) para 174

investigation process. The question applies equally as to why the UK government are proceeding with the Bill when the OTP stated in their final report, closing the preliminary examination into the UK, that the application of the presumption against prosecution may result in the UK being found not to have complied with the principle of complementarity.⁴⁵

This is an additional problem when it is considered that the government has not provided what could be considered a robust explanation of why the presumption against prosecution is applicable five years after the offence took place. The government, in their initial consultation, proposed that the presumption against prosecution would come into effect after ten years.⁴⁶ However, as noted elsewhere, the Bill was published without an explanation of why the presumption would now apply after only five years has passed.⁴⁷ In their response to the initial consultation, published six months after the Bill was unveiled, the government stated the following:

“As the issue we are seeking to address relates to historical alleged offences, we did not feel able to apply the presumption without a timeframe; but given the strength of the views expressed, we felt that a time frame of less than ten years would be more appropriate. The presumption measure within the Bill therefore applies five years after the alleged offence/event.”⁴⁸

⁴⁵ OTP Final Report (n 1) para 479

⁴⁶ Ministry of Defence (n 8) 9

⁴⁷ Liberty (n 35) para 6; Law Society, ‘Parliamentary briefing: Overseas Operations (Service Personnel and Veterans) Bill: Second Reading Debate – House of Commons’ (Law Society, 23 September 2020) <<https://tlsprdsitecore.azureedge.net/-/media/files/topics/human-rights/law-society-briefing-overseas-operations-bill-commons-second-reading-23-september-2020.pdf?rev=fab6285cafdb410189e4a2b277b99e99&hash=33DB51D3AB9BCE5081C06076B6DB9202>> (Last accessed 15 May 2021), 2

⁴⁸ Ministry of Defence, ‘Public consultation on Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom: Ministry of Defence Analysis and Response’ (Ministry of Defence, 17 September 2020) <<http://qna.files.parliament.uk/ws-attachments/1235259/original/20200907-MOD%20Analysis%20and%20Response-FINAL.pdf>> (Last accessed 20 March 2021), 12

Similar explanations were also provided during the Bill's Committee Stage proceedings in the House of Commons,⁴⁹ and in a letter to the Chair of the House of Commons Defence Select Committee.⁵⁰

This explanation seems to indicate that there is no definitive reason why the presumption against prosecution has been set at five years. This is especially concerning because one of the prosecuting authorities expected to apply the presumption against prosecution, the Crown Prosecution Service (CPS) (who the government stated had been consulted on the contents of the Bill)⁵¹ expressed concern about the presumption and its impact on justice in their evidence to the Joint Committee on Human Rights:

“The statutory time limitation is inconsistent with the practice of the CPS which is to prosecute non-recent cases if they pass the Full Code Test (FCT) in The Code for Crown Prosecutors and do not amount to an abuse of the court's process. We note that the time limitation has been reduced from 10 years in the consultation document to 5 years in the Bill. The shorter time period will increase the risk that victims of serious offences may be denied justice.”⁵²

The CPS also note that a failure to launch a prosecution based on the application of the presumption against prosecution may lead to the risk of ICC intervention.⁵³ This again raises questions about exactly what the government's intention when introducing the Overseas Operations Bill was since one of the authorities expected to apply the presumption has stated their opposition to it.

⁴⁹ Overseas Operations (Service Personnel and Veterans) Bill Deb 14 October 2020 col 150

⁵⁰ Johnny Mercer, 'Letter, dated 18 September, from the Minister for Defence People and Veterans, in relation to vexatious claims against veterans and the Overseas Operations Bill' (House of Commons Defence Select Committee, 18 September 2020) <<https://committees.parliament.uk/publications/2676/documents/26551/default/>> (Last accessed 15 May 2021)

⁵¹ Overseas Operations (Service Personnel and Veterans) Bill Deb 14 October 2020 col 190

⁵² Crown Prosecution Service, 'Written evidence from the Crown Prosecution Service (CPS) (OOB0032)' (Joint Committee on Human Rights, 11 September 2020) <<https://committees.parliament.uk/writtenevidence/12288/pdf>> (Last accessed 15 May 2021), 1

⁵³ *ibid*

This again makes it difficult to accept the notion that the Bill does not act as a barrier to prosecutions.

The final aspect to be discussed in this section is the requirement that in order to rebut the presumption against prosecution in relation to offences allegedly committed by armed services personnel, exceptional circumstances must exist. Exactly when these requirements will be met is not defined in the Bill. The Ministry of Defence stated that:

“We decided against defining the term “exceptional” in order to safeguard prosecutorial independence and also because it would be very difficult to set out all the circumstances in which an alleged offence could be considered “exceptional”. However, we are confident that prosecutors will recognise the high bar it introduces and that they will be able to effectively and accurately apply it to their decision making.”⁵⁴

This is a matter which has raised concern with the CPS who state that ‘the rebuttable presumption against prosecution may be inconsistent with the public interest stage of the FCT... The risk is that the presumption may fetter prosecutorial discretion.’⁵⁵ Additionally, the fact that the exceptional circumstances requirement will also apply to crimes including torture and war crimes,⁵⁶ has led critics of the Bill to state that the Bill makes it increasingly difficult to prosecute such crimes.⁵⁷

⁵⁴ Ministry of Defence Consultation Response (n 48) 14

⁵⁵ Crown Prosecution Service (n 52) 1

⁵⁶ Johnny Mercer stated during the Bill’s Committee Stage that ‘On a case-by-case basis, a prosecutor can determine that a case against an individual in relation to war crimes, torture or genocide is “exceptional” and that a prosecution is therefore appropriate, subject to the approval of the Attorney General’: Overseas Operations (Service Personnel and Veterans) Bill Deb 14 October 2020 col 206. See also, Johnny Mercer ‘We must not let our veterans down – the Overseas Operations Bill will stop the endless cycle of investigations’ (*The Telegraph*, 20 September 2020) <<https://www.telegraph.co.uk/politics/2020/09/20/must-not-let-veterans-the-overseas-operations-bill-will-stop/>> (Last accessed 15 May 2021)

⁵⁷ See, for example, Jarvis (n 4) and (n 38); Cherry (n 4); Guthrie (n 6); Sam Johnstone Hawke, ‘How the UK government could effectively decriminalise torture in 3 easy steps’ (Reprieve, 11 September 2020) <<https://reprieve.org/uk/2020/09/11/how-the-uk-government-could-effectively-decriminalise-torture-in-3-easy-steps/>> (Last accessed 15 May 2021); Conor Gearty, ‘The Overseas Operations Bill: a licence for atrocity’ (Prospect Magazine, 25 September 2020) <<https://www.prospectmagazine.co.uk/politics/overseas-operations-bill-armed-forces-military-human-rights-law-labour-party>> (Last accessed 15 May 2021); and Juan E Mendez and Others, ‘Written evidence from the American University Washington College of Law, Center for Human

This is an issue which is further complicated by the potential for clauses 2 and 3 of the Bill to combine to prevent a prosecution from taking place. As Johnny Mercer stated when leading the Bill through its Committee Stage proceedings:

“The prosecutor must consider the presumption against prosecution under clause 2 to determine whether a case meets the exceptional threshold. The prosecutor, as required by clause 3, must also give particular weight to matters that may, in effect, tip the balance in favour of not prosecuting. Clause 3 is therefore integral to supporting the high threshold set in clause 2 for a prosecutor to make a decision to prosecute.”⁵⁸

This is problematic since Quenivet highlights that the requirement that the factors listed in clause 3 of the Bill which have to be considered by prosecutors ‘so far as they tend to reduce the person’s culpability or otherwise tend against prosecution’,⁵⁹ runs contrary to the provisions of international criminal law in that they do not serve to provide soldiers with a justification for committing offences, with the reality being that adverse effects on soldiers only serve as possible mitigation during sentencing.⁶⁰ Additionally, it is highlighted that where offences were committed as a result of the circumstances of conflict, this would be an aggravating factor at sentencing.⁶¹

Furthermore, the government appear to accept that the factors listed within Clause 3 of the Bill are already considered by prosecutors.⁶² However, Mercer states that enshrining the consideration of these factors in law serves to

Rights & Humanitarian Law (OOB0029)’ (Joint Committee on Human Rights, 11 September 2020) <<https://committees.parliament.uk/writtenevidence/11637/pdf>> (Last accessed 15 May 2021), para 10.

⁵⁸ Overseas Operations (Service Personnel and Veterans) Bill Deb 14 October col 204

⁵⁹ Overseas Operations (Service Personnel and Veterans) Bill (n 10) cl 3(1)

⁶⁰ Noelle Quenivet, ‘Occupational Hazards of Soldiers – A Critique of Section 3 of the Overseas Operations (Service Personnel and Veterans) Bill 2019-21’ (EJIL:Talk!, 17 September 2020) <<https://www.ejiltalk.org/occupational-hazards-of-soldiers-a-critique-of-section-3-of-the-overseas-operations-service-personnel-and-veterans-bill-2019-21/>> (Last accessed 15 May 2021)

⁶¹ *ibid*

⁶² Overseas Operations (Service Personnel and Veterans) Bill Deb 14 October 2020 col 205

reassure members of the armed forces that the context of armed conflicts will be taken into account by prosecutors.⁶³

Judge Blackett states that 'Clause 3 is engaged after five years. It seems bizarre to me that in deciding to prosecute, you have a post-five-year test, but not a pre-five-year test.'⁶⁴ The fact that there is no requirement for prosecutors to consider the factors listed in Clause 3 before five years have passed makes it difficult to understand how the Bill cannot be seen to restrict prosecutorial independence to at least some degree, something which the government stated they were trying to avoid when enacting Clause 2, since they are requiring prosecutors to consider specific factors when making decisions about whether to initiate a prosecution or not. This may give pause for concern, as it could lead to the OTP deciding to launch an investigation if prosecutorial decisions could be interpreted as 'shielding the person concerned from criminal responsibility for crimes within the Jurisdiction of the Court',⁶⁵ a factor for determining unwillingness under Article 17(2) of the Rome Statute. The OTP have even stated that the impact of the Bill could lead to the Preliminary Examination into the UK being reopened.⁶⁶

2. Clause 5: Consent to Prosecute

Under Clause 5 of the Bill, the consent of the Attorney General is required in order to prosecute a crime to which the presumption against prosecution applies.⁶⁷ This has been subject to criticism on the basis that since the Attorney General is a member of the government, there is the potential for prosecutorial decisions to be subject to political considerations.⁶⁸ Whether the requirement of consent does actually subject prosecutorial decisions to such considerations is unclear however, since as has been pointed out elsewhere, the consent of the

⁶³ *ibid*

⁶⁴ Overseas Operations (Service Personnel and Veterans) Bill Deb 8 October 2020 col 124

⁶⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 17(2)(a)

⁶⁶ OTP Final Report (n 8) para 479

⁶⁷ Overseas Operations (Service Personnel and Veterans) Bill (n 10) cl 5

⁶⁸ See, for example, the comments of Clive Baldwin in Overseas Operations (Service Personnel and Veterans) Bill Deb 6 October 2020 col 63.

Attorney General is required in order to prosecute a number of offences including those under the International Criminal Court Act 2001, Geneva Conventions Act 1957 and torture as defined in the Criminal Justice Act 1988.⁶⁹ Additionally, it is stated in the Framework agreement between the Law Officers and the Director of Public Prosecutions that ‘when taking a decision whether to consent to a prosecution, the Attorney General acts quasi-judicially and independent of government applying well established prosecution principles of evidential sufficiency and public interest.’⁷⁰ On this basis, it appears unlikely that the requirement of Attorney General consent would prevent the prosecution of criminal offences.

3. Clause 6 and Schedule 1: The Crimes Included/Excluded from the Presumption against Prosecution

As stated in clause 6 of the Overseas Operations Bill, all offences under UK law are included in the presumption against prosecution, with the exception of those offences included within Schedule 1 of the Bill.⁷¹ In the version of Schedule 1, as originally introduced, the only crimes subject to this exclusion from the presumption against prosecution are sexual offences.⁷² There is no specific exclusion for the full range of international crimes listed within the Rome Statute, with Bill Minister Johnny Mercer stating in a letter to the Chair of the House of Commons Defence Select Committee Chair Tobias Ellwood that the government ‘do not believe that such an exclusion to the Bill is necessary. The

⁶⁹ Overseas Operations (Service Personnel and Veterans) Bill Deb 8 October 2020 col 125. See also, Elizabeth Wilmshurst: Joint Committee on Human Rights, ‘Oral evidence: The Overseas Operations Service Personnel and Veterans) Bill, HC 665’ (Houses of Parliament, 28 September 2020) <<https://committees.parliament.uk/oralevidence/949/pdf/>> (Last accessed 15 May 2021), Q7. For the relevant provisions of the Acts referred to, see: International Criminal Court Act 2001, s. 53(3); Geneva Conventions Act 1957, s. 1A(3); Criminal Justice Act 1988, s. 135.

⁷⁰ Attorney General’s Office and Crown Prosecution Service, ‘Framework agreement between the Law Officers and the Director of Public Prosecutions’ (13 March 2019), para 50.

⁷¹ Overseas Operations (Service Personnel and Veterans) Bill (n 10) cl 6

⁷² *ibid* Schedule 1. Clause 6(6) of the Bill allows the list of offences included within Schedule 1 to be changed through statutory instruments, which Stubbins Bates argues is ‘concerning for Parliamentary sovereignty and scrutiny, as it suggests that whatever the Parliamentary debate on amendments to Schedule 1, the executive can add and remove offences from the list at will.’: Elizabeth Stubbins Bates, ‘Legislating by Soundbite: The Overseas Operations (Service Personnel and Veterans) Bill’ (EJIL:Talk!, 18 September 2020) <<https://www.ejiltalk.org/legislating-by-soundbite-the-overseas-operations-service-personnel-and-veterans-bill/>> (Last accessed 15 May 2021)

measures contained in the Bill do not amount to an unwillingness or inability to investigate or prosecute'.⁷³

During the Bill's Committee Stage, Mercer provided a further explanation as to why sexual offences are excluded from the presumption against prosecution but offences such as war crimes, torture and murder were not:

"In the discharge of your military duties, you can expect to be accused of assault, unlawful killing, murder and torture when using violence. There is no scenario in which our people will be asked to operate in which they can legitimately commit sexual offences. This country has a strong commitment against the use of sexual violence as a weapon of war and that is why it is in the Bill."⁷⁴

Similar sentiments were also expressed by the Defence Secretary during the Bill's Second Reading debate.⁷⁵ The position taken by the government in failing to exclude non-sexual offences from the presumption against prosecution does not appear to make sense if the assertion of Nicholas Mercer, the former 1 (UK) Division Legal Advisor in Iraq, that 'torture was originally included in the same category as sexual offences' is accurate.⁷⁶ It is difficult to see how an offence could be interpreted as worthy of inclusion within the Bill in the early stages of drafting but then only prosecutable under exceptional circumstances by the time the Bill was formally laid before Parliament. This serves to raise further questions about the government's justification of the Bill.

Additionally, the Bill as currently written may serve to undermine the UK's commitment to its obligations under international law. For example, Bates states that:

⁷³ Letter from Johnny Mercer to Tobias Ellwood (n 50)

⁷⁴ Overseas Operations Bill (Service Personnel and Veterans) Bill Deb 20 October 2020 col 233

⁷⁵ HC Deb 23 September 2020 vol 680 cols 986-87

⁷⁶ Joint Committee on Human Rights (n 69) Q3; Jon Stone, 'Government added 'free pass for torture' to Overseas Operational Bill at last minute, MPs told' (*The Independent*, 28 September 2020) <<https://www.independent.co.uk/news/uk/politics/government-british-troops-immunity-prosecution-human-rights-b674479.html>> (Last accessed 15 May 2021)

“Schedule 1’s selectivity undermines the enforcement of international humanitarian law. In keeping only one category of war crimes outside the Bill’s scope, the drafters fail to acknowledge that international humanitarian law foresees no time limit on the obligation to prosecute or extradite those suspected of grave breaches of the Four Geneva Conventions 1949 and Additional Protocol I.”⁷⁷

Additionally, it is recognised that under customary international humanitarian law, States are under an obligation to conduct prosecutions for war crimes in both international and non-international armed conflicts,⁷⁸ and that statutes of limitations are not applicable in relation to such offences.⁷⁹ Whilst the presumption against prosecution contained within the Overseas Operations Bill has yet to be formally classified as a statute of limitations by a competent tribunal, it is worth noting the commentary to the International Committee of the Red Cross customary international humanitarian law database states that:

“The recent trend to pursue war crimes more vigorously in national and international criminal courts and tribunals, as well as the growing body of legislation giving jurisdiction over war crimes without time-limits, has hardened the existing treaty rules prohibiting statutes of limitation for war crimes into customary law. In addition, the operation of statutory limitations could prevent the investigation of war crimes and the prosecution of the suspects and would constitute a violation of the obligation to do so”⁸⁰

Michael Clarke, the former Director General of the Royal United Services Institute, has stated that the perception that the UK could be perceived to have enacted a statute of limitations would be a matter of concern for military leaders

⁷⁷ Bates (n 72)

⁷⁸ International Committee of the Red Cross, ‘Rule 158. Prosecution of War Crimes’ (International Humanitarian Law Database) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158> (Last accessed 15 May 2021)

⁷⁹ International Committee of the Red Cross, ‘Rule 160. Statutes of limitation’ (International Humanitarian Law Database) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule160> (Last accessed 15 May 2021)

⁸⁰ *ibid*

as this could result in armed forces personnel being prosecuted for crimes by the ICC or on the basis of universal jurisdiction.⁸¹ This leads to further questions regarding why the UK would run the risk of being seen to be in breach of its international obligations by seeking to enact legislation designed to protect the military that the military themselves do not necessarily support.

It is additionally clear that it is not just in the area of international humanitarian law that the United Kingdom may run the risk of being seen to be in violation of its international obligations, as the European Court of Human Rights has consistently noted that amnesties and statutes of limitations cannot act to prevent prosecutions for violations of the right to life under Article 2 of the European Convention on Human Rights or the prohibition of torture and inhuman treatment under Article 3 of the European Court of Human Rights.⁸² Furthermore, the Human Rights Committee in their General Comment Number 36 on the right to life under Article 6 of the International Covenant on Civil and Political Rights state that:

“Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, and comparable measures leading to de facto or de jure impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy.”⁸³

The United Nations Committee against Torture in their General Comment Number 2 also state that:

⁸¹ Michael Clarke, ‘The UK’s Overseas Operations Bill: Good Questions, Wrong Answers’ (Royal United Services Institute, 7 October 2020) <<https://rusi.org/commentary/uks-overseas-operations-bill-good-questions-wrong-answers>> (Last accessed 15 May 2021)

⁸² See, for example, *Abdülşamet Yaman v Turkey* App no. 32446/96 (ECtHR, 2 November 2004), para 55; *Yeter v Turkey* App No. 33750/03 (ECtHR 13 January 2009), para 70; *Association “21 December 1989” and Others v Romania* app No. 33810/07 (ECtHR, 24 May 2011), para 144; *Aslakhanova and Others v Russia* App Nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10 (ECtHR, 18 December 2012), para 237; and *Marguš v Croatia* App No. 4455/10 (ECtHR 27 May 2014), para 127

⁸³ Human Rights Committee, ‘General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life’ (30 October 2018) UN Doc CCPR/C/GC/36, para 27

“Article 2, paragraph 2, provides that the prohibition against torture is absolute and non-derogable. It emphasizes that *no exceptional circumstances whatsoever* may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction... The Committee is deeply concerned at and rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety... The Committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.”⁸⁴

The Committee has also expressed these sentiments in respect of the right to redress for victims of torture under Article 14 of the Torture Convention.⁸⁵

That the Bill may serve to violate the UK’s obligations under international law can also be demonstrated by recent communications from officials within the United Nations. For example, in a letter sent by the Torture Committee in September 2020, it is stated:

“With regard to the Committee’s recommendation to refrain from enacting legislation that would amnesty or pardon troops who could have been implicated in mistreatment, the Committee is seriously concerned at reports indicating that the Overseas Operations (Service Personnel and Veterans) Bill... would be akin to a statute of limitations and risks creating impunity for torture and other serious offences.”⁸⁶

⁸⁴ United Nations Committee against Torture, ‘General Comment No.2: Implementation of Article 2 by States Parties’ (24 January 2008) UN Doc CAT/C/GC/2, para 5

⁸⁵ United Nations Committee against Torture, ‘General Comment No.3: Implementation of article 14 by States parties’ (13 December 2012) UN Doc CAT/C/GC/3, para 38; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (adopted 10 December 1984, entered into force 26 June 1987), Article 14

⁸⁶ Bakhtiyar Tuzmukhamedov, ‘Letter to Julian Braithwaite, dated 4 September 2020’ (Office of the High Commissioner for Human Rights, 4 September 2020) <https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/GBR/INT_CAT_FUL_GBR_4_3019_E.pdf> (Last accessed 15 May 2021), 2.

Additionally, as has already been referred to, a group of UN experts in October 2020 stated that the Overseas Operations Bill 'undermines the absolute and non-derogable nature of the prohibition of torture and violates human rights law, as well as international criminal and human rights law'.⁸⁷

As well as potentially being seen to represent a violation of international law, the presumption against prosecution may also serve to create a situation where the application of criminal law is seen to be selective. One critique of the Bill, presented by the former Attorney General Dominic Grieve, is that in situations where an allegation involves both sexual and non-sexual offences, it may be the case that because of the presumption against prosecution, a prosecution may only be pursued in relation to the sexual offence allegations.⁸⁸ This creates another potential difficulty for the UK in attempting to demonstrate to the ICC that they have complied with the principle of complementarity, as the OTP's Preliminary Examination focused on both sexual and non-sexual offences.⁸⁹ It may be the case that the OTP decides to launch an investigation into UK personnel if the presumption against prosecution is seen to limit prosecutions for non-sexual offences, and therefore results in the UK not conducting prosecutions for the same conduct as the ICC. The Pre-Trial Chamber in *Lubanga* did state 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'.⁹⁰

It is unclear why the UK government decided that it was worth running the risk of breaching its obligations under international law by seeking to enact a presumption against prosecution which, based on past prosecutorial practice, will only have a limited impact. It is also difficult to envisage how the Bill serves to protect service personnel since the OTP have stated that it could lead to the

⁸⁷ Office of the High Commissioner for Human Rights (n 23)

⁸⁸ Grieve (n 4)

⁸⁹ 2019 Preliminary Examination Report (n 8) para 163

⁹⁰ *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 (10 February 2006), para 31

Preliminary Examination into the UK being reopened.⁹¹ The OTP have also referred to the Bill as creating a ‘statute of limitations’,⁹² and stated that the impact of the Bill means that it ‘could effectively provide an amnesty to current and former service personnel for allegations arising from Iraq’.⁹³ The Office of the Prosecutor has argued that such provisions run contrary to international law.⁹⁴

4. Conclusion

This Chapter has discussed the contents of Part 1 of the Overseas Operations (Service Personnel and Veterans) Bill in order to explore whether it signals that the UK is willing to conduct investigations and prosecutions in relation to the offences under examination by the ICC. Whilst the Bill may only impact a small number of prosecutorial decisions in relation to Iraq, it is far from certain that the Bill does indicate that the UK is willing to conduct prosecutions in relation to the conflict. This is because the presumption against prosecution means that, apart from sexual offences, prosecutions could only occur in exceptional circumstances. The OTP will have to decide whether the Bill, once enacted, indicates that the UK is unwilling to conduct prosecutions into alleged war crimes.

This decision is one that will no doubt be complicated by the seeming difficulty in explaining what the purpose of the Bill is. As has previously been stated, the government stated that one of the objectives of the Bill was to bring to an end to the notion that service personnel will be subjected to multiple investigations in relation to the same allegations.⁹⁵ However, the Bill Minister conceded that ‘the presumption will not directly impact on investigations’.⁹⁶ Furthermore, the government stated that ‘we have never suggested that service personnel or veterans have been subject to unfair trials’,⁹⁷ but at the same time advocated for

⁹¹ OTP Final Report (n 8) para 479

⁹² *ibid*

⁹³ *ibid* para 489

⁹⁴ *ibid* para 478

⁹⁵ Ministry of Defence (n 1)

⁹⁶ Overseas Operations (Service Personnel and Veterans) Bill Deb 14 October 2020 col 193

⁹⁷ *ibid* col 191

a rebuttable presumption against prosecution where ‘the threshold for rebutting that presumption will be high’.⁹⁸ It is therefore justifiable for the OTP to question whether the Bill signals a reluctance to prosecute alleged war crimes on the part of the UK.

Additionally, there does not appear to be a convincing explanation as to why there is a need for either a presumption against prosecution to apply five years after an alleged offence takes place, or for why only sexual offences are excluded from the presumption against prosecution. Whilst neither of these factors necessarily mean that the UK is unwilling to conduct investigations and prosecutions into allegations of serious crimes, they are particularly noteworthy, since as discussed in the context of the Iraq Historic Allegations Team, the UK government has faced allegations that investigations have been subject to political interference. It would therefore be expected that the UK may have to answer questions about the Bill, especially when, as referred to previously, they have cited the IHAT experience as a reason for pursuing the Bill.

Whether or not the Bill ultimately impacts the OTP’s assessment of UK compliance with the principle of complementarity, the Bill has impacted the UK’s reputation internationally. For example, in their report on the Bill, the Joint Committee of Human Rights stated that the Bill may have an impact on future military operations,⁹⁹ and that:

“We regret the impact that the introduction of the Bill has already had on the reputation of the Armed Forces and of the UK internationally. We would further call on the Government to consider very carefully the message that it sends to troops about accountability and compliance with international humanitarian law and international human rights law.”¹⁰⁰

⁹⁸ *ibid* col 193

⁹⁹ Joint Committee on Human Rights, *Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill* (2019-2021, HC 665, HL 155), para 161

¹⁰⁰ *ibid* para 160

Conclusion

The purpose of this thesis has been to explore and critique the extent to which States faced with allegations that their personnel are responsible for war crimes comply with the principle of complementarity found within Article 17 of the Rome Statute.¹ In order to achieve this aim, this thesis has discussed the situation in two States where the International Criminal Court (ICC) Office of the Prosecutor (OTP) has scrutinised allegations of war crimes – the United Kingdom and the United States of America.² This has involved the discussion of criminal law relevant to the offences under scrutiny by the OTP within both states and the investigative processes deployed by both States. This conclusion will summarise the findings of the thesis and discuss the potential implications for international criminal justice as the ICC approaches its twentieth year in operation.

1. The United States of America

The analysis of the situation in the United States conducted within Chapters Two-Four of this thesis have served to illustrate that there are serious doubts about the extent to which the United States is either willing or able to conduct investigations or prosecutions as required under Article 17 of the Rome Statute.³ For example, in Chapter Two's discussion of criminal law in the United States, it was highlighted that the current version of the War Crimes Act in effect, which retroactively applies to the time period when the OTP alleges that most offences committed by US personnel were committed, does not include the crime of outrages upon personal dignity which forms part of the focus of the

¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 17. Because this thesis has served to critique the extent to which the UK and US have complied with the principle of complementarity, this conclusion will not make any recommendations for reform of the investigatory processes employed by the two States examined or the principle of complementarity. To do this would require a wider examination of the investigative processes employed by States relating to allegations of war crimes.

² For a full explanation of why the conduct of these two States have been analysed, see *supra* 2-9

³ Rome Statute (n 1) Article 17

OTP's ongoing investigation.⁴ Additionally, it was shown that it is questionable whether members of the United States military could be prosecuted for sexual offences allegedly committed in Afghanistan under the definitions of rape and indecent assault found under the versions of the Uniform Code of Military Justice which was in force at the time offences were allegedly committed due to in the case of rape an incomplete *actus reus*, and in the case of indecent assault, a potential lack of *mens rea*.⁵ Furthermore, in relation to the crimes of torture and cruel and inhuman treatment, Chapter Two also highlighted that the definitions of these offences mean that it would be very difficult to prosecute US personnel for these offences, a task made more difficult as a result of memos produced by the Office of Legal Counsel which restricted the definition of torture to only the most extreme actions.⁶

This raises questions about the extent to which the United States would be able to claim that it has complied with the principle of complementarity since the ICC Pre-Trial Chamber held in *Lubanga* that in order to satisfy the principle of complementarity, States have to investigate the same conduct which forms the focus of investigations conducted by the OTP.⁷ It should be remembered that cases involving United States personnel are potentially admissible before the ICC because the alleged conduct took place in the context of the armed conflict in Afghanistan, who are a party to the Rome Statute, and Article 12(2)(a) of the Rome Statute allows the ICC to assert jurisdiction where alleged crimes have taken place in the territory of a State Party to the Rome Statute.⁸

Whilst the United States has maintained that it has held individuals who are responsible for war crimes and torture to account,⁹ Chapter Four's analysis of

⁴ supra 54-57

⁵ supra 60-63

⁶ supra 65-80

⁷ *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 (10 February 2006), para 31; for discussion of the same person and conduct test, see supra 18-22

⁸ Rome Statute (n 1) Article 12(2)(a)

⁹ See, for example: United States Department of State, 'Daily Press Briefing – November 15, 2016' (United States Department of State, 15 November 2016) <<https://2009-2017.state.gov/r/pa/prs/dpb/2016/11/264350.htm>> (Last accessed 15 May 2021); Mark T Esper, 'Remarks by Secretary of Defense Mark T. Esper at ICC Press Conference' (United States Department of Defense, 11 June 2020)

criminal investigations in the United States showed that there were difficulties in determining the precise nature of accountability measures pursued by US authorities.¹⁰ It was also shown that the United States has adopted measures which serve to limit the extent to which individuals responsible for abuses committed against detainees can be held responsible for offences in the form of a formal defence where there has been good faith reliance on legal advice,¹¹ and a policy adopted by the Attorney General not to prosecute in such situations.¹² This raises further questions about the extent to which the United States is willing to conduct investigations into alleged offences committed by their personnel.

Finally, Chapter Three examined two reports of the United States Senate investigating the detention and interrogation programs operated by the Department of Defense and Central Intelligence Agency, respectively. The analysis conducted in this chapter highlighted raised further doubts about the extent to which the United States could have complied with the principle of complementarity. It was shown that both detention and interrogation programs were formulated based on practices that were previously used to train members of the armed forces to resist unlawful interrogations by enemy forces.¹³ Additionally, in both programs, the individuals responsible for oversight were unaware of the extent to which detention and interrogation practices were being used or did very little to ensure that authorised practices were being conducted in a manner compatible with guidelines.¹⁴

In the context of the DoD's interrogation program, it was also shown that there was significant opposition to the techniques that were approved for use at

<<https://www.defense.gov/Newsroom/Speeches/Speech/Article/2216306/remarks-by-secretary-of-defense-mark-t-esper-at-icc-press-conference/>> (Last accessed 15 May 2021); and Human Rights Council, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: United States of America' (13 August 2020) UN Doc A/HRC/WG.6/36/US/1, para 82

¹⁰ supra 133-44

¹¹ supra 144-46

¹² supra 140-44

¹³ supra 88-97 in the context of the Department of Defense program and 118-22 in the context of the CIA program.

¹⁴ supra 101-04 in the context of the Department of Defense program and 110-15 in the context of the CIA program.

Guantanamo Bay but which ultimately came to be used in Afghanistan.¹⁵

Furthermore, it was also shown that in relation to the CIA's detention and interrogation program, that there were concerns in relation to the quality of staff involved in the program at the time the program was in operation,¹⁶ and that there was resistance within the CIA to internal accountability mechanisms.¹⁷

However, despite the considerable findings of these reports, Chapter Three also showed that they did not result in the individuals responsible for the creation and operation of the two detention and interrogation programs being held to account.¹⁸ This shows further a seeming lack of commitment on the part of the United States to individuals who are responsible for alleged war crimes being held to account. Such a finding can be reached without even considering the fact that in relation to the Report of the United States Senate Committee, the utility of the report as being a statement of fact has been undermined by disagreements between the major political parties and the CIA about the factual findings and conclusions.¹⁹ It is therefore unlikely in the case of the United States that the use of non-criminal investigative mechanisms demonstrates compliance with the principle of complementarity.

The notion that the approach taken by the United States does not necessarily comply with the principle of complementarity should not be seen as being a total surprise since the US has been resistant to the notion of the ICC being able to assert jurisdiction over its personnel ever since the creation of the Rome Statute.²⁰ For instance, in remarks from senior officials in administrations which

¹⁵ supra 97-100

¹⁶ supra 106-109

¹⁷ supra 115-17

¹⁸ supra 125-31

¹⁹ supra 123-24

²⁰ See, for example, David Scheffer's comments to the Subcommittee on International Relations in July 1998: Subcommittee on International Operations, 'Is a U.N. International Criminal Court in the U.S. National Interest?' (Senate Hearing 105-724, 23 July 1998) <<https://www.govinfo.gov/content/pkg/CHRG-105shrg50976/pdf/CHRG-105shrg50976.pdf>> (Last accessed 15 May 2021) 13. See also the comments of State Department spokesperson Elizabeth Trudeau in November 2016: State Department (n 9); and Donald Trump: White House, 'Remarks by President Trump to the 73rd Session of the United Nations General Assembly | New York, NY' (White House, 25 September 2018) <<https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/>> (Last accessed 15 May 2021)

bookend the period between the creation of the Rome Statute to the time of writing, Bill Clinton stated in 2000 that ‘Court jurisdiction over U.S. personnel should come only with U.S. ratification of the treaty’;²¹ and in 2020, Defense Secretary Mark Esper proclaimed ‘Rest assured that the men and women of the United States Armed Forces will never appear before the ICC – nor will they ever be subjected to the judgments of unaccountable international bodies.’²²

However, in this case, complying with the principle of complementarity should not be that controversial since it would mean that the United States of America is living up to the stated values of the United States of America. For example, the foreword to the DoD’s Law of War Manual makes it clear that compliance with international humanitarian law is required for the military to function effectively during an armed conflict.²³ In the context of torture, the argument against torture was stated eloquently by Assistant Secretary of State Tom Malinowski in 2014 when it was stated:

“The United States was founded on the principle of respect for the dignity of the individual, and no crime offends human dignity more than torture. The prohibition of torture and cruel treatment is part of our Constitution, and it binds our federal government and all 50 of our states. We believe that torture, and cruel, inhuman and degrading treatment are forbidden in all places, at all times, with no exceptions. The legal and moral argument against torture would be dispositive under any circumstances. It would not matter to that argument if torture were effective; our experience also taught that it is not. It not only devastates its victims, but harms people and countries that employ it.”²⁴

²¹ White House, ‘Statement by the President’ (White House, 31 December 2000) <https://clintonwhitehouse4.archives.gov/library/hot_releases/December_31_2000.html> (Last accessed 15 May 2021)

²² Esper (n 9)

²³ Department of Defense Office of General Counsel, *Department of Defense Law of War Manual June 2015 (Updated December 2016)* (Department of Defense 2016) <<https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>> (Last accessed 15 May 2021), ii

²⁴ Tom Malinowski, ‘Assistant Secretary Malinowski: Torture is forbidden in all places, at all times, with no exceptions.’ (United States Mission to International Organizations in Geneva’ (United States Mission to International Organizations in Geneva, 12 November 2014)

In respect of the allegations being investigated by the OTP, it is clear that United States personnel did commit torture. A sitting President of the United States has even admitted that. Speaking before the release of the Senate Intelligence Committee's Report into the CIA's Detention and Interrogation Program, Barack Obama stated, 'we tortured some folks. We did some things that were contrary to our values'.²⁵ It should therefore be overwhelmingly in the interests of the United States to ensure that those who are responsible for acts of torture are held responsible, since this would not only remove the potential for the ICC to assert jurisdiction over US personnel, but it would allow for the United States to live up to what they state they believe in.

Instead, as has been shown in this thesis, the US has only taken limited action to ensure that individuals responsible for such heinous actions have been held accountable. A failure to hold people accountable is something which continues to have effects within the United States. For example, Hajjar states that a lack of accountability for torture is not only one reason that 'torture haunts US politics' but it also 'undermines the strength of the anti-torture norm globally'.²⁶ Additionally, Schmidt and Sikkink argued that the Obama Administration's 'failure to enforce the United States' normative commitments has contributed to continued weakness of the norm against torture in the United States and

<<https://geneva.usmission.gov/2014/11/12/malinowski-torture-and-degrading-treatment-and-punishment-are-forbidden-in-all-places-at-all-times-with-no-exceptions/>> (Last accessed 15 May 2021)

²⁵ White House, 'Press Conference by the President' (White House, 1 August 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/press-conference-president>> (Last accessed 15 May 2021). Obama additionally stated following the release of the Senate Intelligence Committee's Report that 'some of the actions that were taken were contrary to our values. That is why I unequivocally banned torture when I took office': White House, 'Statement by the President Report of the Senate Select Committee on Intelligence' (White House, 9 December 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/12/09/statement-president-report-senate-select-committee-intelligence>> (Last accessed 15 May 2021) However, it should also be noted that Obama stated that those who relied on flawed legal advice in good faith should not be subject to prosecution: White House, 'Statement of President Barack Obama on Release of OLC Memos' (White House, 16 April 2009) <<https://obamawhitehouse.archives.gov/the-press-office/statement-president-barack-obama-release-olc-memos>> (Last accessed 15 May 2021)

²⁶ Lisa Hajjar, 'The Afterlives of Torture: The Global Implications of Reactionary US Politics' (2019) 8(2) State Crime 164, 171-72

elsewhere'.²⁷ To use the words of Katherine Hawkins, 'Obama's opposition to looking backward made it impossible to look forward'.²⁸

Furthermore, under the Trump Administration, attacks on the ICC have resulted in senior ICC personnel including the Prosecutor, Fatou Bensouda, having their visas revoked,²⁹ and having economic sanctions imposed against them.³⁰ These sanctions were criticised by Daniel Fried, who served in numerous diplomatic positions including as the State Department's Coordinator for Sanctions Policy,³¹ as 'It creates the reality, not just the impression of the United States as a unilateralist bully with contempt for international law and norms'.³² Prior to the imposition of economic sanctions, Jorgensen stated that attacks by the United States on the ICC served to lend credence to the idea that the US would not cooperate with any investigation into allegations of war crimes in Afghanistan.³³ Actions taken by States such as the United States do have an effect on the ICC though. The Independent Expert Review of the ICC, for example, states the following:

²⁷ Averell Schmidt and Kathryn Sikkink, 'Breaking the Ban? The Heterogenous Impact of US Contestation of the Torture Norm' (2019) 4(1) *Journal of Security Studies* 105, 118

²⁸ Katherine Hawkins, 'We Can't "Look Forward" on the Trump Administration's Abuses' (Just Security, 11 December 2020) <<https://www.justsecurity.org/73825/we-cant-look-forward-on-the-trump-administrations-abuses/>> (Last accessed 15 May 2021)

²⁹ Marlise Simons and Megan Specia, 'U.S. Revokes Visa of I.C.C. Prosecutor Pursuing War Crimes' (*New York Times*, 5 April 2019) <<https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html>> (Last accessed 15 May 2021)

³⁰ Julian Borger, 'US imposes sanctions on top international criminal court officials' (*The Guardian*, 2 September 2020) <<https://www.theguardian.com/law/2020/sep/02/us-sanctions-international-criminal-court-fatou-bensouda>> (Last accessed 15 May 2021)

³¹ United States Department of State, 'Daniel Fried' (United States Department of State) <<https://2009-2017.state.gov/r/pa/ei/biog/46525.htm>> (Last accessed 15 May 2021)

³² Pranshu Verma, 'Trump's Sanctions on International Court May Do Little Beyond Alienating Allies' (*New York Times*, 18 October 2020) <<https://www.nytimes.com/2020/10/18/world/europe/trump-sanctions-international-criminal-court.html>> (Last accessed 15 May 2021). Academic reaction to the imposition of sanctions on the ICC has also been critical. See, for example, Mark Kersten, 'Crossing the Line – Trump Approves Sanctions against Staff at the ICC' (Justice in Conflict, 18 June 2020) <<https://justiceinconflict.org/2020/06/18/crossing-the-line-trump-approves-sanctions-against-staff-at-the-icc/>> (Last accessed 15 May 2021); Leila Sadat, 'First They Came for Me and My Colleagues: The U.S. Attack on the Int'l Criminal Court' (Just Security, 29 June 2020) <<https://www.justsecurity.org/70996/first-they-came-for-me-and-my-colleagues-the-us-attack-on-the-intl-criminal-court/>> (Last accessed 15 May 2021); and, Susan Akram and Gabor Rona, 'Why the Executive Order on the ICC is Unconstitutional and Self-Defeating' (Opinio Juris, 13 August 2020) <<http://opiniojuris.org/2020/08/13/why-the-executive-order-on-the-icc-is-unconstitutional-and-self-defeating/>> (Last accessed 15 May 2021)

³³ Malcolm Jorgensen, 'The Afghanistan Investigation and the International Legal Order' (Lawfare, 6 April 2020) <<https://www.lawfareblog.com/afghanistan-investigation-and-international-legal-order>> (Last accessed 15 May 2021).

“While a lack of cooperation from certain non-states parties has been an issue dogging the work of the Court from the start, in recent years it has faced an even bigger challenge in the adoption by certain countries of policies of active opposition to the Court. This has resulted in threatened sanctions against members of the Court, including the Prosecutor herself, as well as a questioning of the integrity of the Judges and of the OTP. This intimidation has not only impacted the morale of the Court, but has undermined its credibility in certain quarters, including in countries that hitherto had provided at least some cooperation.”³⁴

The Independent Expert Review recommended that because of the ICC’s inability to defend itself from attacks as a result of its need to avoid any perception of bias, States should speak out to defend the ICC.³⁵ In fairness to the international community, States have spoken out against attacks by the US on the ICC,³⁶ but the idea that the US would be resistant to an ICC investigation should not be a surprise. For example, John Bellinger, who served as the State Department Legal Advisor during the second term of the George W Bush Administration, stated that ‘No American administration, Republican or Democratic, would fail to respond to an actual or threatened criminal investigation of U.S. military personnel and officials or fail to warn the court about the consequences of such an investigation.’³⁷

³⁴ Panel of Independent Experts, ‘Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report’ (ICC Assembly of States Parties, 30 September 2020) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf> (Last accessed 15 May 2021), para 399

³⁵ *ibid* para R169

³⁶ Permanent Mission of France to the United Nations in New York, ‘We remain committed to an international rules-based order’ (Permanent Mission of France to the United Nations in New York, 23 June 2020) <<https://onu.delegfrance.org/We-remain-committed-to-an-international-rules-based-order>> (Last accessed 15 May 2021); Permanent Mission of France to the United Nations in New York, ‘We reiterate our commitment to uphold and defend the principles enshrined in the Rome Statute’ (Permanent Mission of France to the United Nations in New York, 2 November 2020) <<https://onu.delegfrance.org/We-reiterate-our-commitment-to-uphold-and-defend-the-principles-and-values>> (Last accessed 15 May 2021).

³⁷ John Bellinger, ‘The Trump Administration Throws Down the Gauntlet to the ICC. The Court Should Decline the Challenge’ (Lawfare, 10 September 2018) <<https://www.lawfareblog.com/trump-administration-throws-down-gauntlet-icc-court-should-decline-challenge>> (Last accessed 15 May 2021)

While it is questionable whether any other administration would have acted in the same manner as the Trump Administration did – the Trump Administration showed a reluctance to engage with international law,³⁸ it is also, at best, questionable that the strategies being pursued by the ICC to encourage the United States to pursue investigations and prosecutions themselves are working. This may be reflective of a broader trend as Guilfoyle argues that prosecutions involving non-member State party nationals are unlikely to succeed under the current ICC system as there is no incentive for such States to cooperate with the ICC, and that a key challenge for the ICC moving forwards will be how it manages situations involving non-member States.³⁹

The findings of this thesis therefore indicate a clear need for the ICC to improve its ability to persuade States that it is in their interests to conduct investigations and prosecutions themselves in order to avoid potential ICC jurisdiction. Such an endeavour should be in the interests of the ICC since it would allow them to edge closer to their goal of ending impunity for international crimes,⁴⁰ whilst respecting the right of States to not ratify the Rome Statute. In the case of the United States, this persuasion should not be necessary since a sitting President of the United States has admitted that US personnel were responsible for torture.

2. The United Kingdom

The analysis conducted in this thesis in relation has shown that despite the UK having the capability to prosecute the alleged crimes which formed the basis of the Office of the Prosecutor's (OTP) Preliminary Examination, as illustrated by Chapter Five's analysis of a cross-section of applicable criminal law, there are

³⁸ See, for example, Hathaway's discussion of the international agreements the Trump Administration has withdrawn from: Oona Hathaway, 'Reengaging on Treaties and Other International Agreements (Part I): President Donald Trump's Rejection of International Law' (Just Security, 2 October 2020) <<https://www.justsecurity.org/72656/reengaging-on-treaties-and-other-international-agreements-part-i-president-donald-trumps-rejection-of-international-law/>> (Last accessed 15 May 2021)

³⁹ Douglas Guilfoyle, 'Is the International Criminal Court destined to pick fights with non-state parties?' (EJIL:Talk!, 14 July 2020) <<https://www.ejiltalk.org/is-the-international-criminal-court-destined-to-pick-fights-with-non-state-parties/>> (Last accessed 15 May 2021)

⁴⁰ Rome Statute (n 1) Preamble

serious questions about the extent to which the UK has complied with the principle of complementarity.⁴¹ Chapter Six's analysis of the Baha Mousa Report demonstrated that as a result of institutional issues within the Ministry of Defence, techniques which had been held by the European Court of Human Rights to constitute inhuman and degrading treatment nearly thirty years earlier were used in Iraq.⁴² Additionally, despite attempts to ban the use of hooding, the practice still continued to be used to what in the case of Baha Mousa were devastating consequences.⁴³ It was also shown that despite the findings of the Baha Mousa Inquiry, a referral to the Iraq Historic Allegations Team (IHAT), and its successor organisation the Service Police Legacy Investigations (SPLI), ultimately resulted in no prosecution being brought because of 'lack of evidence'.⁴⁴

Chapter Seven's discussion of IHAT showed that IHAT had the perception of a credibility problem with its independence being subject to challenge,⁴⁵ as well as accusations of political interference,⁴⁶ cover-ups,⁴⁷ and being subject to constant delays.⁴⁸ Finally, Chapter Eight's discussion of the Overseas Operations Bill demonstrates that the UK government intends to enact legislation to address the perceived problem of vexatious prosecutions, a problem which not only does not exist, but may result in the UK being seen to be unwilling to prosecute those service personnel who have been accused of the most serious of crimes found within international law.⁴⁹

⁴¹ *supra* Chapter Five, in particular 154-59 for discussion of the International Criminal Court Act 2001

⁴² *Ireland v UK* (1978) Series A No 25 para 168; *supra* 178-90

⁴³ *supra* 195-200 and 211-14 for discussions of attempts to ban hooding

⁴⁴ Service Police Legacy Investigations 'Information for Complainants Table' (Service Police Legacy Investigations, 6 July 2020)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897897/20200706-SPLI_Information_for_complainants_table.pdf> (Last accessed 15 May 2021); Office of the Prosecutor, 'Situation in Iraq/UK: Final Report' (International Criminal Court, 9 December 2020) <<https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>> (Last accessed 15 May 2021), 77-79

⁴⁵ *supra* 227-33

⁴⁶ *supra* 233-45

⁴⁷ *supra* 251-53

⁴⁸ *supra* 245-46

⁴⁹ *supra* Chapter Eight generally

The analysis conducted in this thesis does however demonstrate why UK prosecutors may not have pursued prosecutions against individuals alleged to have been involved in the commission of war crimes. For example, Chapter Six's discussion of the application of command responsibility based on information within the Baha Mousa Report demonstrates how difficult it would be to apply the principle in the context of UK involvement in Iraq, as there was no indication found within the Report that senior military officials were aware of the continued use of hooding after an order to ban the use of hooding had been issued.⁵⁰ Additionally, the analysis of the Baha Mousa Report also highlights that inadequate training provided to military personnel was the result of institutional failures, and therefore may serve as a mitigating factor in instances where individuals may have committed actions which were not perceived to have been unlawful.⁵¹ Furthermore, despite IHAT being subject to criticism, there is no question that the personnel acting within IHAT were acting in anything other than a professional manner in order to fulfil what was a very difficult investigative obligation,⁵² and even sought to ensure that allegations which could not be proven were disposed of in a manner which was judicially endorsed.⁵³

However, this cannot serve to justify the UK's failure to hold personnel accountable for alleged crimes committed by UK personnel in Iraq, as according to information disclosed by the MoD in November 2020, 'there have been a total of five prosecutions relating to Iraq since 2003'.⁵⁴ This is the case even though the OTP stated that, as a minimum, there is 'a reasonable basis' to believe that there have been 7 victims of the war crime of wilful killing,⁵⁵ 54 victims of the war crimes of torture or inhuman/cruel treatment and outrages upon personal

⁵⁰ supra 200-211

⁵¹ supra 190-94

⁵² Sir David Calvert-Smith, 'Review of the Iraq Historic Allegations Team' (Attorney General's Office, 15 September 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553195/Flag_A_-_IHAT_Review_for_Attorney_General_final_12_September.pdf> (Last accessed 15 May 2021), para 4.3

⁵³ supra 247-49

⁵⁴ Ministry of Defence, 'Letter, dated 3 November 2020, to Roseanne Burke, CEASEFIRE', available at <https://www.ceasefire.org/wp-content/uploads/2020/12/FOI2020_06821-Response-V2.pdf> (Last accessed 15 May 2021)

⁵⁵ OTP Final Report (n 44) para 78

dignity,⁵⁶ and 7 victims of the war crimes of rape and sexual violence.⁵⁷ Based on these prosecutorial inconsistencies alone, questions have to be asked about how the UK can possibly have complied with the principle of complementarity. The findings of this thesis in relation to the UK's investigative steps only serve to intensify these questions.

The findings in relation to the UK were reached on the basis of research conducted predominantly before the OTP released their final report on the Preliminary Examination into the UK. The OTP declined to launch an investigation into the UK and decided to close the preliminary examination into the UK,⁵⁸ and stated that they:

“cannot conclude that the UK authorities have been unwilling genuinely to carry out relevant investigative inquiries and/or prosecutions (article 17(1)(a)) or that decisions not to prosecute in specific cases resulted from unwillingness genuinely to prosecute (article 17(1)(b)). Specifically, for the purpose of article 17(2), the Office cannot conclude that the relevant investigative inquiries or investigative/prosecutorial decisions were made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court...”⁵⁹

Despite the decision of the OTP to not pursue an investigation into the UK, the findings of this thesis remain the same. It is questionable that the UK complied with the principle of complementarity, and the OTP's findings serve to highlight why it is questionable that the UK complied with the principle of complementarity. Whilst a number of these reasons have been highlighted within earlier chapters, it is still worth noting one example of the OTP's conclusions here – those made in relation to the role of Public Interest Lawyers. In relation to the discussion of IHAT's closure being the result of a desire by the UK to dismiss allegations presented by Public Interest Lawyers because of their

⁵⁶ *ibid* para 81

⁵⁷ *ibid* para 102

⁵⁸ *Ibid* para 503

⁵⁹ *ibid* para 502

founder being removed from the Roll of Solicitors,⁶⁰ the OTP's Report states that 'IHAT and the SPA appear to have placed over-reliance on the SDT's disciplinary findings against Phil Shiner and PIL to terminate lines of criminal inquiry that may have otherwise progressed.'⁶¹ The OTP additionally stated that the filtering process adopted as a result of this was 'more conservative than may have been warranted',⁶² and 'was not the only reasonable course of action in the circumstances'.⁶³ Despite making these findings, the OTP did not make a finding that the UK was unwilling or unable to conduct investigations into alleged war crimes, as they state that explanations provided by UK authorities about why they proceeded in the way they did were 'generally reasonable'.⁶⁴ For example, in relation to the previously mentioned finding that IHAT may have closed investigations into allegations derived from Public Interest Lawyers earlier than may otherwise have been the case, the OTP stated:

"IHAT and SPLI continued to consider the most serious and well supported claims originating from PIL... even if the Office disagrees with approach adopted, it was not so unreasonable or deficient as to constitute evidence of unwillingness to carry out relevant investigations or prosecutions genuinely, in the sense of showing an intent to shield perpetrators from criminal justice."⁶⁵

Baldwin states that 'the report gives the impression that the Office often bends over backwards to give the UK the benefit of the doubt, even when the evidence is against it'.⁶⁶ Heller additionally questions the evidential basis on which the OTP justified their decision, stating that the OTP was insistent on requiring a

⁶⁰ *supra* 237-45

⁶¹ OTP Final Report (n 44) para 345

⁶² *ibid* para 349

⁶³ *ibid*

⁶⁴ *ibid* para 499

⁶⁵ *ibid* para 350

⁶⁶ Clive Baldwin, 'The ICC Prosecutor Office's Cop-Out on UK Military Crimes in Iraq' (Opinio Juris, 18 December 2020) <<http://opiniojuris.org/2020/12/18/the-icc-prosecutor-offices-cop-out-on-uk-military-crimes-in-iraq/>> (Last accessed 15 May 2021)

higher level of evidence than was required under the Rome Statute for the purposes of requesting an investigation.⁶⁷

Based on the above, it is difficult to do anything but draw unflattering comparisons between the OTP's decision not to launch an investigation into the UK with the decision of the Pre-Trial Chamber not to approve the Prosecutor's request to open an investigation in relation to Afghanistan.⁶⁸ The Afghanistan decision had been criticised by Ochs who stated that 'by rewarding the United States for its failure to cooperate, the PTC sends the message that Western powers are immune from international prosecution for war crimes'.⁶⁹ Labuda also argued that 'there is certainly a perception that, in avoiding a clash with the world's superpower, this decision serves primarily the ICC's own institutional self-interest'.⁷⁰ In the case of the UK, the OTP demonstrated why launching an investigation into the conduct of one of the Court's most politically influential allies in the UK could be justified but has chosen not to investigate.

The perception that the OTP's decision is damaging to international justice can be seen in the reaction of a number of human rights NGOs who have been critical of the OTP's decision. For example, Matthew Cannock of Amnesty International stated:

“The Prosecutor's decision to conclude the preliminary examination provides a road-map for obstructionism. It rewards bad faith and delays brought about by the failure of the UK military and authorities to conduct

⁶⁷ Kevin Jon Heller, 'The Nine Words that (Wrongly) Doomed the Iraq Investigation' (Opinio Juris, 10 December 2020) <<http://opiniojuris.org/2020/12/10/the-nine-words-that-wrongly-doomed-the-iraq-investigation/>> (Last accessed 15 May 2021)

⁶⁸ *Situation in the Islamic Republic of Afghanistan* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17-33 (12 April 2019)

⁶⁹ Sara L Ochs, 'The United States, the International Criminal Court, and the Situation in Afghanistan' (2019) 95(2) *Notre Dame Law Review Reflection* 89, 96

⁷⁰ Patryk I Labuda, 'A Neo-Colonial Court for Weak States? Not Quite. Making Sense of the International Criminal Court's Afghanistan Decision' (EJIL:Talk!, 13 April 2019) <<https://www.ejiltalk.org/a-neo-colonial-court-for-weak-states-not-quite-making-sense-of-the-international-criminal-courts-afghanistan-decision/>> (Last accessed 15 May 2021)

independent and impartial investigations in the immediate aftermath of the conflict in Iraq.”⁷¹

Additionally, Human Rights Watch legal advisor Clive Baldwin argued that the OTP’s decision ‘will doubtless fuel perceptions of an ugly double standard in justice, with one approach for powerful states and quite another for those with less clout’.⁷² Wolfgang Kaleck of the European Center for Constitutional and Human Rights stated that the OTP report ‘reinforces longstanding double standards in international justice and shows once again that powerful actors can get away with systematic torture’.⁷³

Academic reaction to the OTP’s decision has also questioned whether the decision could have an impact on the ICC’s ability to hold individuals accountable. Sterio, for example, states:

“In light of this decision, it may become relatively easy for other powerful states to evade the ICC’s reach by launching their own “genuine” investigations... Complementarity may become a shield in and of itself, despite the fact that complementarity is actually supposed to ensure that perpetrators aren’t shielded from ICC’s prosecutorial reach. If states are able to avoid the ICC on complementarity grounds in the future, this could seriously undermine the court’s legitimacy.”⁷⁴

⁷¹ Amnesty International, ‘ICC decision on UK military in Iraq rewards obstructionism’ (Amnesty International, 10 December 2020) <<https://www.amnesty.org/en/latest/news/2020/12/icc-decision-on-uk-military-in-iraq-rewards-obstructionism/>> (Last accessed 15 May 2021)

⁷² Human Rights Watch, ‘United Kingdom: ICC Prosecutor Ends Scrutiny of Iraq Abuses’ (Human Rights Watch, 10 December 2020) <<https://www.hrw.org/news/2020/12/10/united-kingdom-icc-prosecutor-ends-scrutiny-iraq-abuses>> (Last accessed 15 May 2021)

⁷³ European Center for Constitutional and Human Rights, ‘Negative Decision by the ICC Prosecutor is a Severe Blow to Iraqi Torture Victims and International Justice’ (European Center for Constitutional and Human Rights, 9 December 2020) <<https://www.ecchr.eu/en/press-release/war-crimes-by-uk-forces-iraq-negative-decision-icc/>> (Last accessed 15 May 2021). See also, Andreas Schueller, ‘The ICC, British War Crimes in Iraq and a Very British Tradition’ (Opinio Juris, 11 December 2020) <<http://opiniojuris.org/2020/12/11/the-icc-british-war-crimes-in-iraq-and-a-very-british-tradition/>> (Last accessed 15 May 2021); and REDRESS, ‘ICC Prosecutor’s Decision Not to Investigate UK Abuses in Iraq is a Further Blow for Accountability’ (REDRESS, 9 December 2020) <<https://redress.org/news/icc-prosecutors-decision-not-to-investigate-uk-abuses-in-iraq-is-a-further-blow-for-accountability/>> (Last accessed 15 May 2021)

⁷⁴ Milena Sterio, ‘The ICC Prosecutor’s Final Report into the Iraq/UK Investigation: Concerns Over Complementarity and the Court’s Future Legitimacy’ (IntLawGrrls, 9 December 2020)

This not only adds to the perception that the OTP may have damaged the perception of international criminal justice but the fact that the OTP reached such a decision should also be concerning because of the State the decision concerns. The UK is a founder member of the International Criminal Court and when debating the legislation to implement the Rome Statute into UK law, Foreign Secretary Robin Cook proclaimed, 'British service personnel will never be prosecuted by the International Criminal Court because any *bona fide* allegation will be pursued by the British authorities.'⁷⁵ This means that there should not have been any question about whether the UK complied with the principle of complementarity.

However, as previously stated, the OTP concluded that there was evidence to suggest that British personnel were responsible for war crimes, and that concerns existed in relation to the investigatory processes pursued by the UK. The OTP additionally stated that 'the UK Government, and in particular the MoD, have at best been reluctant, if not at times hostile, partners to pursuing claims of criminal responsibility against members of UK armed forces'.⁷⁶ For the OTP to decide not to launch an investigation in such circumstances is therefore a matter of concern, as it raises the question of how the OTP will react in future situations where complementarity is at issue. If the ICC is to ever fulfil its mandate, the OTP will have to conduct investigations in situations where it is difficult to make a determination about the principle of complementarity.⁷⁷ In this situation, the OTP suggested that a reason for not pursuing an investigation was the potential for a successful request to defer any OTP investigation under Article 18 of the Rome Statute.⁷⁸ However, as Heller argues, it would surely

<<https://ilg2.org/2020/12/09/the-icc-prosecutors-final-report-on-the-afghanistan-uk-investigation-concerns-over-complementarity-and-the-courts-future-legitimacy/>> (Last accessed 15 May 2021)

⁷⁵ HC Deb 3 April 2001 vol 366 col 222

⁷⁶ OTP Final Report (n 44) para 461

⁷⁷ The OTP noted that 'This is the first time that a State's potential unwillingness has formed the primary focus of the Office's complementarity assessment.': *ibid* para 149

⁷⁸ *ibid* para 501. This was also emphasised by the OTP at the launch of the 2020 Preliminary Examination Report: Public International Law and Policy Group, 'ASP19 Side Event: Launch of the Prosecutor's Report on Preliminary Examination Activities 2020' (PILPG, 15 December 2020) <<https://www.publicinternationallawandpolicygroup.org/lawyering-justice->

have been better for justice if there actually was an Article 18 process rather than for the OTP to have decided independently that any challenge to jurisdiction would have been successful.⁷⁹

The response of the UK to the OTP's findings has been one of seeming jubilation. Defence Secretary Ben Wallace stated that the OTP's report 'vindicates our efforts to pursue justice where allegations have been founded. I am pleased that work we have done, and continue to do, in improving the quality and assurances around investigations has been recognised'.⁸⁰ This approach is misplaced, as this thesis and the OTP's findings demonstrate that the UK's investigatory process into alleged war crimes has been subject to many problems which can be criticised on the basis that they are inconsistent with the UK's investigative obligations under international law. The OTP even stated that their Report should not be viewed as 'an endorsement of the UK's approach'.⁸¹

The UK is clearly still engaged with the ICC, as can be demonstrated by the successful campaign to elect Joanna Korner as a judge at the ICC which was endorsed by the Foreign Secretary,⁸² and the fact that the UK has joined in with

blog/2020/12/15/asp19-side-event-launch-of-the-icc-office-of-the-prosecutors-report-on-preliminary-examination-activities-2020> (Last accessed 15 May 2021)

⁷⁹ Kevin Jon Heller, 'Article 18 and the Iraq Declination' (Opinio Juris, 12 December 2020) <<http://opiniojuris.org/2020/12/12/article-18-and-the-iraq-declination/>> (Last accessed 15 May 2021)

⁸⁰ Owen Bowcott, 'ICC abandons inquiry into alleged British war crimes in Iraq' (*The Guardian*, 9 December 2020) <<https://www.theguardian.com/uk-news/2020/dec/09/icc-abandons-inquiry-into-alleged-british-war-crimes-in-iraq>> (Last accessed 15 May 2021)

⁸¹ OTP Final Report (n 44) para 503. See also, International Criminal Court, 'Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom' (International Criminal Court, 9 December 2020) <<https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk>> (Last accessed 15 May 2021)

⁸² For the statement of the Foreign Secretary endorsing the candidacy of Joanna Korner, see: Foreign, Commonwealth and Development Office, 'Her Honour Judge Joanna Korner: UK Candidate for the International Criminal Court Judicial Elections' (Foreign, Commonwealth and Development Office) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927986/Judge-Korner-campaign-brochure-for-International-Criminal-Court-judicial-elections.pdf> (Last accessed 15 May 2021) 2; and for the statement congratulating Korner on her election to the ICC, see: Foreign, Commonwealth and Development Office and Dominic Raab, 'Election of Judge Joanna Korner: Foreign Secretary Statement: December 2020' (Foreign, Commonwealth and Development Office, 18 December 2020) <<https://www.gov.uk/government/news/election-of-judge-joanna-korner-foreign-secretary-statement-december-2020>> (Last accessed 15 May 2021)

efforts denouncing attacks on the ICC by the United States.⁸³ It is also clear, however, that in future, any investigations carried out by the UK should be seen unequivocally as satisfying Article 17 of the Rome Statute. This is especially the case if ‘the United Kingdom believes the Court forms an important part of the rules based international system’,⁸⁴ as the UK Ambassador to the United Nations Jonathan Allen stated was the case in November 2020. However, considering the OTP’s findings and the critique of the decision not to launch an investigation, it cannot be said that the UK has unequivocally satisfied the principle of complementarity through its criminal and non-criminal investigative processes.

3. Concluding Thoughts

This thesis has sought to discuss the extent to which the investigations into alleged war crimes committed by the United States of America and the United Kingdom have satisfied the principle of complementarity at the ICC. The findings do not illustrate that the two States examined complied with the principle of complementarity in the manner envisaged when the Rome Statute was created, despite both States being having a clear interest to ensure that those responsible for such crimes are held accountable. This, alone, should be a matter viewed with dismay by advocates for international justice. However, it may also be the case that how these two States have addressed allegations of war crimes is indicative of a potential need to reform how the ICC deals with the principle of complementarity, as it is not necessarily clear how the risk of ICC intervention has impacted how these States have conducted their investigations.

Determining what reforms are required and how they would be implemented will, however, require further study. The role of non-criminal processes in determining whether a State has complied with the principle of complementarity

⁸³ Permanent Mission of France to the United Nations in New York (n 36)

⁸⁴ Foreign, Commonwealth and Development Office and Jonathan Allen, ‘Promoting international criminal justice and the rule of law’ (Foreign, Commonwealth and Development Office, 2 November 2020) <<https://www.gov.uk/government/speeches/promoting-international-criminal-justice-and-the-rule-of-law>> (Last accessed 15 May 2021)

will also have to be considered in the reform process because, as shown in Chapter One, there is no reason in principle why such processes are incompatible with the idea of complementarity.⁸⁵ This is the case despite the findings of this thesis in relation to the particular non-criminal processes employed by the United Kingdom and the United States of America.

At the present time, however, it is clear that the Court is nowhere near achieving ‘the absence of trials by the ICC, as a consequence of the effective functioning of national systems’, a goal articulated by the OTP in a 2003 policy document.⁸⁶

⁸⁵ *supra* 36-47

⁸⁶ Office of the Prosecutor, ‘Paper on some policy issues before the Office of the Prosecutor’ (ICC, September 2003) <https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf> (Last accessed 15 May 2021) 4

Bibliography

Table of Cases

United Kingdom

- A v Secretary of State for the Home Department [2005] UKHL 71
- al-Saadoon and others v Secretary of State for Defence [2015] EWHC 1769 (Admin)
- al-Saadoon and others v Secretary of State for Defence [2016] EWHC 773 (Admin)
- Ali Zaki Mousa and Others v Secretary of State for Defence [2010] EWHC 1823 (Admin)
- Alseran v Ministry of Defence [2017] EWHC 3289 (QB)
- Andrews v DPP [1937] AC 576
- Attorney-General's Reference (No. 3 of 1994) [1996] QB 581
- C (A Minor) v Eisenhower [1984] QB 331
- Cox v Army Council [1963] AC 48
- DPP v Smith [1961] AC 290
- Hussein v Secretary of State for Defence [2013] EWHC 95 (Admin)
- Hussein v Secretary of State for Defence [2014] EWCA Civ 1087
- R (Al-Saadoon and Others) v Secretary of State for Defence [2015] EWHC 715 (Admin)
- R (Ali Zaki Mousa and Others) v Secretary of State for Defence (No. 2) [2013] EWHC 1412 (Admin)
- R (Ali Zaki Mousa and Others) v Secretary of State for Defence (No. 2) [2013] EWHC 2941 (Admin)
- R (on the Application of Al-Skeini and Others) v Secretary of State for Defence [2004] EWHC 2911 (Admin)
- R (on the Application of Al-Skeini and Others) v Secretary of State for Defence [2005] EWCA Civ 1609
- R (on the Application of Al-Skeini and Others) v Secretary of State for Defence [2007] UKHL 26

R (on the application of Ali Zaki Mousa) v Secretary of State for Defence [2010] EWHC 3304 (Admin)

R (on the application of Mousa) v Secretary of State for Defence and Another [2011] EWCA Civ 1334

R v Bollom [2003] EWCA Crim 2846

R v Chan-Fook [1994] 1 WLR 689

R v Church [1966] 1 QB 59

R v Evans and Others (Decision Following Submissions of No Case to Answer) 3 November 2005 <<https://www.asser.nl/upload/documents/20120412T015138-Evans%20et%20al%20-%20Decision%20of%20No%20Case%20to%20Answer%20-%2003-11-2005%20-.pdf>> (Last accessed 15 May 2021)

R v Golding [2014] EWCA Crim 889

R v Howe [1987] 1 AC 417

R v Ireland [1998] AC 147

R v Lamb [1967] 2 QB 981

R v Lewis [2010] EWCA Crim 151

R v Moloney [1985] 1 AC 905

R v Mowatt [1968] 1 QB 421

R v Newbury [1977] AC 500

R v Page [1954] 1 QB 170

R v Reeves Taylor [2019] UKSC 51

R v Savage, DPP v Parmenter [1992] 1 AC 699

R v Taylor [2009] EWCA Crim 544

R v Williams [1992] 1 WLR 380

R v Woollin [1999] 1 AC 82

Solicitors Regulation Authority v Day [2018] EWHC 2726 (Admin)

Solicitors Regulation Authority v Philip Shiner, SDT Case No. 11510/2016 (Solicitors Disciplinary Tribunal, 2 February 2017)

United States of America

Salim v Mitchell (ED Wash, 13 October 2015) Civil Action No. 2:15-CV-286-JLQ
Complaint and Demand for Jury Trial

<https://www.aclu.org/sites/default/files/field_document/salim_v._mitchell_-_complaint_10-13-15.pdf> (Last accessed 15 May 2021)

United States v Belfast 611 F.3d 783 (11th Circuit 2010)

European Court of Human Rights

Al-Skeini and Others v United Kingdom App no 55721/07 (ECtHR, 7 July 2011)

Aslakhanova and Others v Russia App Nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10 (ECtHR, 18 December 2012)

Assenov and Others v Bulgaria 1998-VIII

El-Masri v The Former Yugoslav Republic of Macedonia App no 39630/09 (ECtHR, 13 December 2012)

Abdülsamet Yaman v Turkey App no. 32446/96 (ECtHR, 2 November 2004)

Abu Zubaydah v Lithuania, App No 46454/11 (ECtHR, 31 May 2018)

Al Nashiri v Poland, App no 28761/11 (ECtHR, 24 July 2014)

Al Nashiri v Romania, App No 33234/12 (ECtHR, 31 May 2018)

Association “21 December 1989” and Others v Romania app No. 33810/07 (ECtHR, 24 May 2011)

Brecknell v United Kingdom App No 32457/04 (ECtHR, 27 November 2007)

Husayn (Abu Zubaydah) v Poland, App No 7511/13 (ECtHR, 24 July 2014)

Ireland v UK (1978) Series A No 25

Ireland v United Kingdom App no 5310/71 (Commission Decision, 25 January 1976)

Marguš v Croatia App No. 4455/10 (ECtHR, 27 May 2014)

McCann and Others v United Kingdom (1995) Series A no 324

Selmouni v France 1999-V

Yeter v Turkey App No. 33750/03 (ECtHR, 13 January 2009)

International Court of Justice

Military and Paramilitary Activities in and against Nicaragua (1986) ICJ Reports

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v Blaškić (Judgment) IT-95-14-A (29 July 2004)
Prosecutor v Brđanin (Judgement) IT-99-36-A (3 April 2007)
Prosecutor v Delalić (Judgement) IT-96-21-T (16 November 1998)
Prosecutor v Delalić (Judgement) IT-96-21-A (20 February 2001)
Prosecutor v Erdemović (Judgement) IT-96-22-A (7 October 1997)
Prosecutor v Krnojelac (Judgement) IT-97-25-T (15 March 2002)
Prosecutor v Kunarac (Judgement) IT-96-23-1-A (12 June 2002)
Prosecutor v Strugar (Judgement) IT-01-42-A (17 July 2008)

International Criminal Court

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)
Prosecutor v Gaddafi and Al-Senussi (Decision on the admissibility of the case against Abdullah Al-Senussi) ICC-01/11-01/11-466-Red (11 October 2013)
Prosecutor v Gaddafi and Al-Senussi (Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”) ICC-01/11-01/11-547-Red (21 May 2014)
Prosecutor v Gaddafi and Al-Senussi (Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”) ICC-01/11-01/11-565 (24 July 2014)
Prosecutor v Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009)
Prosecutor v Jean-Pierre Bemba Gombo (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016)
Prosecutor v Jean-Pierre Bemba Gombo (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/08 A (8 June 2018)

Prosecutor v Jean-Pierre Bemba Gombo (Separate opinion: Judge Christine Van den Wyngaert and Judge Howard Morrison) ICC-01/05-01/08-3636-Anx2 (8 June 2018)

Prosecutor v Muthaura, Kenyatta and Ali (Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”) (Dissenting Opinion of Judge Anita Ušacka) ICC-01/09-02/11-342 (20 September 2011)

Prosecutor v Ruto, Kosgey and Sang (Document in Support of the “Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute) ICC-01/09-01/11-135 (20 June 2011)

Prosecutor v Ruto, Kosgey and Sang (Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”) ICC-01/09-01/11-307 (30 August 2011)

Prosecutor v Saif Al-Islam Gaddafi (Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled ‘Decision on the “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute”’ of 5 April 2019) ICC-01/11-01/11-695 (9 March 2020)

Prosecutor v Simone Gbagbo (Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo) ICC-02/11-01/12/12-47-Red (11 December 2014)

Prosecutor v Simone Gbagbo (Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”) ICC-02/11-01/12-75-Red (27 May 2015)

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 (10 February 2006)

Situation in the Islamic Republic of Afghanistan (Public redacted version of “Request for authorisation of an investigation pursuant to Article 15”) ICC-02/17-7-Red (20 November 2017)

Situation in the Islamic Republic of Afghanistan (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17-33 (12 April 2019)

Situation in the Islamic Republic of Afghanistan (Transcript of hearing, 5 December 2019) ICC-02/17-T-002-ENG (5 December 2019)

Situation in the Islamic Republic of Afghanistan (Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan) ICC-02/17-138 (5 March 2020)

Situation in the Republic of Burundi (Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into Situation in the Republic of Burundi”) ICC-01/17-9-Red (9 November 2017)

Table of Legislation

United Kingdom

Air Force Act 1955

Army Act 1955

Criminal Justice Act 1988

Geneva Conventions Act 1957

Inquiries Act 2005

International Criminal Court Act 2001

Law Reform (Year and a Day Rule) Act 1996

Naval Discipline Act 1955

Offences against the Person Act 1861

Overseas Operations (Service Personnel and Veterans) HC Bill (2019-21) [117]

United States of America

10 US Code s.815(b)

10 US Code s.920 (2000)

10 US Code s.925 (2000)

18 US Code s.2241 (2000)

18 US Code s.2246 (2000)

18 US Code s.2340

18 US Code s.2340A

18 US Code s.2340B

18 US Code s.2441

42 US Code s.2000dd-1

50 US Code s.3517

Detainee Treatment Act of 2005, Public Law 109-148, Title X (30 December 2005)

Foreign Operations, Export Financing and Related Programs Appropriations Act of 1998, Public Law 105-118 (26 November 1997)

Military Commissions Act of 2006, Public Law 109-366 (17 October 2006)

Treaties and Agreements

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Article 23

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (adopted 10 December 1984, entered into force 26 June 1987)

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)

Geneva Convention For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted August 12 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I)

Geneva Convention For the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II)

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV)

Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III)

International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 26 March 1976) (ICCPR) 999 UNTS 171

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90

Statute of the International Criminal Tribunal for Rwanda, adopted under United Nations Security Council Resolution 955 (8 November 1994) UN Doc S/RES/955, as amended

Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted under United Nations Security Council Resolution 827 (25 May 1993) UN Doc S/RES/827, as amended

United Nations Resolutions

United Nations General Assembly Resolution 375 (IV) (6 December 1949)

United Nations Security Council Resolution 1422 (12 July 2002) UN Doc S/RES/1422

United Nations Security Council Resolution 1487 (12 June 2003) UN Doc S/RES/1487

United Nations Security Council Resolution 1593 (31 March 2005) UN Doc S/RES/1593

United Nations Security Council Resolution 1970 (26 February 2011) UN Doc S/RES/1970

Secondary Sources

Books

Bates ETS, *Solving the Conundrum between Military Training, Prevention and Compliance in International Humanitarian Law* (PhD thesis, SOAS University of

London 2018) <https://eprints.soas.ac.uk/30290/1/4580_Bates.pdf> (Last accessed 15 May 2021)

Bergsmo M and Stahn C (eds) *Quality Control in Preliminary Examination: Volume One* (Torkel Opsahl Academic EPublisher, 2018)

-- and Tianying SONG (eds), *Military Self-Interest in Accountability for Core International Crimes* (2nd edn, Torkel Opsahl Academic EPublisher 2018) Coke E, *The Third Part of the Institute of the Laws of England* (Printed by M. Flesher, for W. Lee, and D. Pakeman, 1644)

Freedom House, *Freedom in the World 2011: The Annual Survey of Political Rights and Civil Liberties* (Rowman and Littlefield 2011)

-- *Freedom in the World 2017: The Annual Survey of Political Rights and Civil Liberties* (Rowman and Littlefield 2017)

Goldsmith J, *The Terror Presidency: Law and Judgement inside the Bush Administration* (W.W. Norton and Company 2009)

Harlow B (ed), *Rebuttal: The CIA Responds to the Senate Intelligence Committee's Study of Its Detention and Interrogation Program* (Naval Institute Press 2015)

Judge Advocate General's Legal Center and School, *Criminal Law Deskbook: Practicing Military Justice* (Judge Advocate General's Legal Center and School, July 2018) <https://www.loc.gov/rr/frd/Military_Law/pdf/Crim-Law-Deskbook_July-2018.pdf> (Last accessed 15 May 2021)

O'Mara S, *Why Torture Doesn't Work: The Neuroscience of Interrogation* (Harvard University Press 2015)

Sanders R, *Plausible Legality: Legal Culture and Political Imperative in the Global War on Terror* (Oxford University Press 2018)

United Kingdom Official Documents

1 (UK) Division, Fragmentary Order 152 (30 May 2003), available at <https://webarchive.nationalarchives.gov.uk/20120215214434/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_160310/mod017061.pdf> (Last accessed 15 May 2021)

Attorney General's Office and Crown Prosecution Service, 'Framework agreement between the Law Officers and the Director of Public Prosecutions' (13 March 2019)

Calvert-Smith D, 'Review of the Iraq Historic Allegations Team' (Attorney General's Office, 15 September 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553195/Flag_A_-_IHAT_Review_for_Attorney_General_final_12_September.pdf> (Last accessed 15 May 2021)

Chilcot J, *The Report of the Iraq Inquiry: Volume I* (2016-2017, HC 265-I)

Foley J, 'Interrogation and Related Activities' (21 July 1997)

Forbes T, *The Report of the Al Sweady Inquiry: Volume I* (2014-2015, HC 818-I)

– – *The Report of the Al Sweady Inquiry: Volume II* (2014-2015, HC 818-II)

Gage W, 'Attorney-General's Advice Ruling' (Baha Mousa Inquiry, 1 April 2010)

<https://webarchive.nationalarchives.gov.uk/20120215220327/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings/bmpi-agruling310310v1.pdf> (Last accessed 15 May 2021)

– – *The Report of the Baha Mousa Inquiry: Volume I* (2011-2012, HC 1452-I)

– – *The Report of the Baha Mousa Inquiry: Volume II* (2011-2012, HC 1452-II)

– – *The Report of the Baha Mousa Inquiry: Volume III* (2011-2012, HC 1452-III)

House of Commons Defence Committee, *Who guards the guardians? MoD support for former and serving personnel* (2016-2017, HC 109)

– – *Who guards the guardians? MoD support for former and serving personnel: Government Response to the Committee's Sixth Report* (2016-2017, HC 1149)

House of Commons Defence Sub-Committee, 'Oral evidence: MoD support for former and serving personnel subject to judicial processes, HC 109' (House of Commons, 19 October 2016)

<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/41503.pdf>> (Last accessed 15 May 2021)

– – 'Oral evidence: MoD Support for Former and Serving Personnel Subject to Judicial Process, HC 109' (House of Commons, 15 November 2016)

<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedoc>

ument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/43357.pdf> (Last accessed 15 May 2021)

– – ‘Oral evidence: MoD Support for former and serving personnel subject to judicial processes, HC 109’ (House of Commons, 14 December 2016)

<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/44527.pdf>> (Last accessed 15 May)

Iraq Historic Allegations Team, ‘Iraq Historic Allegations Team (IHAT) Quarterly Update – October to December 2015’ (Iraq Historic Allegations Team, 19 February 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504671/20160222-Quarterly_Update_website.pdf> (Last accessed 15 May 2021)

– – ‘IHAT Quarterly Update – January to March 2016’ (Iraq Historic Allegations Team, 6 May 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525351/20160518-Quarterly_Update_website_Final_2.pdf> (Last accessed 15 May 2021)

– – ‘IHAT Quarterly Update – April to June 2017’ (Iraq Historic Allegations Team, 27 July 2017)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644256/20170809-Quarterly_Update_website_Jun17_1_.pdf> (Last accessed 15 May 2021)

– – ‘IHAT table of work completed (updated October 2017)’ (Iraq Historic Allegations Team, 4 October 2017)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649525/20171003-IHAT_NEW_master_copy_website_work_completed_table-HQComms_O.pdf> (Last accessed 15 May 2021)

Joint Committee on Human Rights, *The UN Convention Against Torture (UNCAT) Volume I* (2005-2006, HL 185-I, HC 701-I)

– – *The UN Convention Against Torture (UNCAT) Volume II* (2005-2006, HL 185-II, HC 701-II)

– – *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* (2006-2007, HL 157, HC 394)

– – ‘Oral evidence: The Overseas Operations Service Personnel and Veterans) Bill, HC 665’ (Houses of Parliament, 5 October 2020)

<<https://committees.parliament.uk/oralevidence/985/pdf/>> (Last accessed 15 May 2021)

– – ‘Oral evidence: The Overseas Operations Service Personnel and Veterans) Bill, HC 665’ (Houses of Parliament, 28 September 2020)

<<https://committees.parliament.uk/oralevidence/949/pdf/>> (Last accessed 15 May 2021)

– – *Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill* (2019-2021, HC 665, HL 155)

Joint Intelligence Committee, ‘Directive on Interrogation by the Armed Forces in Internal Security Operations’ (Cabinet Office, 29 June 1972)

Mercer J, ‘Letter, dated 18 September, from the Minister for Defence People and Veterans, in relation to vexatious claims against veterans and the Overseas Operations Bill’ (House of Commons Defence Select Committee, 18 September 2020)

<<https://committees.parliament.uk/publications/2676/documents/26551/default/>> (Last accessed 15 May 2021)

Ministry of Defence, *Manual of Service Law* (JSP 830 Version 2.0)

– – ‘Systemic Issues Identified from Investigations into Military Operations Overseas: July 2014’ (Ministry of Defence, July 2014)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/327180/Systemic_Issues_identified_from_investigations_into_military_operations_overseas.pdf> (Last accessed 15 May 2021)

– – ‘Systemic Issues Identified from Investigations into Military Operations Overseas’ (Ministry of Defence, July 2015)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450319/20150727-mod-annual-report-systemic-issues-july-2015.pdf> (Last accessed 15 May 2021)

– – ‘Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom’ (Ministry of Defence, 22 July 2019)

<<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/a>

- ttachment_data/file/919822/20190718-MOD_consultation_document-FINAL.pdf> (Last accessed 15 May 2021)
- – ‘Overseas Operations (Service Personnel and Veterans) Bill: Impact Assessment’ (Ministry of Defence, 25 August 2020)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918954/Impact-assessment-OO_SPV__Bill__Final__002_.pdf> (Last accessed 15 May 2021)
- – ‘Public consultation on Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom: Ministry of Defence Analysis and Response’ (Ministry of Defence, 17 September 2020)
<<http://qna.files.parliament.uk/ws-attachments/1235259/original/20200907-MOD%20Analysis%20and%20Response-FINAL.pdf>> (Last accessed 20 March 2021)
- – ‘Letter, dated 3 November 2020, to Roseanne Burke, CEASEFIRE’, available at <https://www.ceasefire.org/wp-content/uploads/2020/12/FOI2020_06821-Response-V2.pdf> (Last accessed 15 May 2021)
- Mordaunt P, ‘Letter to Carla Ferstman, dated 22 February 2016’
<<https://redress.org/wp-content/uploads/2017/12/Reply-from-Ministry-of-Defence-22February-Correspondence-with-UK-Government-on-IHAT-Investigation.pdf>> (Last accessed 15 May 2021)
- – ‘Legal Protections and Support for Armed Forces Personnel and Veterans’ (UK Parliament, 21 May 2019) <<https://questions-statements.parliament.uk/written-statements/detail/2019-05-21/HCWS1575>> (Last accessed 15 May 2021)
- S012, ‘Hooding’ (12 May 2004)
<https://webarchive.nationalarchives.gov.uk/20120215214006/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_040510/mod028364.pdf> (Last accessed 15 May 2021)
- – ‘PH&TQ and Interrogation’ (11 May 2004)
<https://webarchive.nationalarchives.gov.uk/20120215214010/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_040510/mod028363.pdf> (Last accessed 15 May 2021)

Service Police Legacy Investigations, 'SPLI Quarterly Update: 1 July to 30 September 2018' (SPLI, 30 September 2018)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758500/20181120-SPLI_FINAL_QTR_REPORT_Jul-Sep18.pdf> (Last accessed 15 May 2021)

-- 'SPLI – Quarterly Update – 1 April 2020 to 30 June 2020' (Service Police Legacy Investigations, 1 July 2020)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/909154/20200708-SPLI_QTR_RPT-1APR20-30JUN20-FINAL.pdf> (Last accessed 15 May 2021)

-- 'Information for Complainants Table' (Service Police Legacy Investigations, 6 July 2020)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897897/20200706-SPLI_Information_for_complainants_table.pdf> (Last accessed 15 May 2021)

The Baha Mousa Public Inquiry, 'Witness Statement of Lieutenant General Robin Brims' (5th March 2010)

<https://webarchive.nationalarchives.gov.uk/20120215205253/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_100610/bmi07382.pdf> (Last accessed 15 May 2021)

United States Official Documents

Bradbury SG, 'Memorandum for John A. Rizzo Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May be Used in the Interrogation of a High Value al Qaeda Detainee*' (Office of Legal Counsel, 10 May 2005) <<https://www.justice.gov/olc/file/886271/download>> (Last accessed 15 May 2021)

-- 'Memorandum for John A Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain*

Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees (Office of Legal Counsel, 20 July 2007)

<<https://www.justice.gov/olc/file/886296/download>> (Last accessed 15 May 2021)

Bush GW, 'Humane Treatment of al Qaeda and Taliban Detainees' (7 February 2002) <<https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020207-2.pdf>> (Last accessed 15 May 2021)

Bybee JS, 'Memorandum for Alberto R Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*' (Office of Legal Counsel, 1 August 2002)

<<https://www.justice.gov/olc/file/886061/download>> (Last accessed 15 May 2021)

– – 'Memorandum for John Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Interrogation of al Qaeda Operative*' (Office of Legal Counsel, 1 August 2002) <<https://www.justice.gov/olc/file/886076/download>> (Last accessed 15 May 2021)

Central Intelligence Agency Office of Inspector General, 'Report of Investigation: Unauthorized Interrogation Techniques at [Redacted]' (29 October 2003) Report No. 2003-7123-IG

<<https://www.cia.gov/readingroom/docs/0006541525.pdf>> (Last accessed 15 May 2021)

– – 'Special Review: Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003), Report No. 2003-7123-IG (7 May 2004) <<https://www.cia.gov/readingroom/docs/0005856717.pdf>> (Last accessed 15 May 2021)

– – 'Death of a Detainee in [Redacted]', (27 April 2005) Report No. 2004-7402-IG <https://www.thetorturedatabase.org/files/foia_subsite/cia_25_29.x.pdf> (Last accessed 15 May 2021)

– – 'Report of Audit: CIA-controlled Detention Facilities Operated Under the 17 September 2001 Memorandum of Notification' (14 June 2006) Report No. 2005-0017-AS <<https://www.cia.gov/readingroom/docs/0006541721.pdf>> (Last accessed 15 May 2021)

Central Intelligence Agency, 'Role of Mitchell, Jessen, and Associates in CTC RDG program' (undated)

<https://www.thetorturedatabase.org/files/foia_subsite/14_1.pdf> (Last accessed 15 May 2021)

-- 'Response to request from Director for Assessment of EIT effectiveness' (Central Intelligence Agency, 23 September 2005)

<<https://www.cia.gov/readingroom/docs/0006541719.pdf>> (Last accessed 15 May 2021)

-- 'CIA's Use of Contract Interrogators' (27 November 2007)

<https://www.thetorturedatabase.org/files/foia_subsite/13_0.pdf> (Last accessed 15 May 2021)

-- 'CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention and Interrogation Program' (Central Intelligence Agency, 27 June 2013) <https://fas.org/irp/congress/2014_rpt/cia-ssci.pdf> (Last accessed 15 May 2021)

Church AT, 'Review of Department of Defense Detention Operations and Detainee Interrogation Techniques' (7 March 2005)

<<https://www.therenditionproject.org.uk/documents/RDI/050307-DoD-Church-Report-on-Detention-and-Interrogation-Techniques.pdf>> (Last accessed 15 May 2021)

Defense Legal Policy Board, 'Report of the Subcommittee on Military Justice in Combat Zones: Military Justice in cases of U.S. Service members alleged to have caused the death, injury or abuse of non-combatants in Iraq or Afghanistan' Defense Legal Policy Board, 30 May 2013)

<<https://www.hsdl.org/?view&did=743021>> (Last accessed 15 May 2021)

Department of Defense Office of General Counsel, *Department of Defense Law of War Manual June 2015 (Updated December 2016)* (Department of Defense 2016)

<<https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>> (Last accessed 15 May 2021)

Department of the Army, *The Law of Land Warfare* (Field Manual 27-10, Department of the Army 1956)

<https://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf> (Last accessed 15 May 2021)

– – *Military Judges' Benchbook* (Department of the Army, 29 February 2020, DA PAM 27-9)

<https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN21189_P27_9_FINAL.pdf> (Last accessed 15 May 2021)

Haynes WJ, 'Counter-Resistance Techniques' (27 November 2002)

<<https://nsarchive2.gwu.edu/torturingdemocracy/documents/20021127-1.pdf>> (Last accessed 15 May 2021)

Joint Personnel Recovery Agency, 'Operational Issues Pertaining to the Use of Physical/Psychological Coercion in Interrogation' (25 July 2002)

<https://www.washingtonpost.com/wp-srv/nation/pdf/JPRA-Memo_042409.pdf> (Last accessed 15 May 2021)

Joint Service Committee on Military Justice, *Manual for Courts-Martial United States (2002 Edition)* (Joint Service Committee on Military Justice, 2002)

<https://www.loc.gov/rr/frd/Military_Law/pdf/manual-2002.pdf> (Last accessed 15 May 2021)

Levin DL, 'Memorandum Opinion for James B. Comey, Deputy Attorney General, *Re: Legal Standards Applicable under 18 U.S.C. 2340-2340A*' (Office of Legal Counsel, 30 December 2004)

<https://www.globalsecurity.org/security/library/policy/national/doj-dag_torture-memo_30dec2004.pdf> (Last accessed 15 May 2021)

Margolis D, 'Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigations 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' (5 January 2010)

<<https://fas.org/irp/agency/doj/opr-margolis.pdf>> (Last accessed 15 May 2021)

Mora A, 'Statement for the Record: Office of General Counsel Involvement in Interrogation Issues' (7 July 2004)

<https://www.thetorturedatabase.org/files/foia_subsite/mora_memo_july_2004_0.pdf> (Last accessed 15 May 2021)

Office of Professional Responsibility, 'Report: 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' (Office of Professional Responsibility, 29 July 2009) <<https://fas.org/irp/agency/doj/opr-final.pdf>> (Last accessed 15 May 2021)

Office of the Inspector General for the Department of Defense, 'Review of DoD-Directed Investigations of Detainee Abuse' (25 August 2006) Report No. 06-INTEL-10 <<https://media.defense.gov/2016/May/19/2001774103/-1/-1/1/06-INTEL-10.pdf>> (Last accessed 15 May 2021)

-- 'Field Verification – Interrogation and Survival, Evasion, Resistance, and Escape Techniques Recommendation' (16 April 2010) Report No. 10-INTEL-05 <<https://media.defense.gov/2016/Apr/28/2001774110/-1/-1/1/10-INTEL-05.pdf>> (Last accessed 15 May 2021)

Ogrisseg JF, 'Psychological Effects of Resistance Training' (24 July 2002) <<https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020724.pdf>> (Last accessed 15 May 2021)

Phifer J, 'Request for approval of Counter-Resistance Strategies' (11 October 2002) <https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Detainee_Related/Request_for_approval_of_counter-resistance_strategies_08F0130_Final.pdf> (Last accessed 15 May 2021)

(Last accessed 15 May 2021)

Rumsfeld D, 'Counter-Resistance Techniques' (15 January 2003) <<https://nsarchive2.gwu.edu/torturingdemocracy/documents/20030115-1.pdf>> (Last accessed 15 May 2021)

-- 'Detainee Interrogations' (15 January 2003) <<https://nsarchive2.gwu.edu/torturingdemocracy/documents/20030115-2.pdf>> (Last accessed 15 May 2021)

-- 'Counter-Resistance Techniques in the War on Terrorism' (16 April 2003) <<https://nsarchive2.gwu.edu/torturingdemocracy/documents/20030416.pdf>>

Subcommittee on International Operations, 'Is a U.N. International Criminal Court in the U.S. National Interest?' (Senate Hearing 105-724, 23 July 1998) <<https://www.govinfo.gov/content/pkg/CHRG-105shrg50976/pdf/CHRG-105shrg50976.pdf>> (Last accessed 15 May 2021)

Tenet G, 'Guidelines on Interrogation Conducted Pursuant to the Presidential Memorandum of Notification of 17 September 2001' (28 January 2003)

<<https://www.cia.gov/readingroom/docs/0006541522.pdf>> (Last accessed 15 May 2021)

United States Army, *Code of Conduct, Survival, Evasion, Resistance, and Escape (SERE) Training* (Army Regulation 350-30, 10 December 1985)

<<https://fas.org/irp/doddir/army/ar350-30.pdf>> (Last accessed 15 May 2021)

– – *Human Intelligence Collector Operations* (Army Field Manual 2-22.3, September 2006) <<https://fas.org/irp/doddir/army/fm2-22-3.pdf>> (Last accessed 15 May 2021)

– – *Personnel Recovery* (Army Regulation 525-28, 5 March 2010)

<https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r525_28.pdf> (Last accessed 15 May 2021)

United States Senate Committee on Armed Services, 'The Treatment of Detainees in U.S. Custody – Hearings before the Committee on Armed Services of the United States Senate' (Senate Hearing 110-720, 17 June and 25 September 2008) <https://fas.org/irp/congress/2008_hr/treatment.pdf> (Last accessed 15 May 2021)

United States Senate Select Committee on Armed Services, *Inquiry into the Treatment of Detainees in U.S. Custody* (Senate Printout 110-54, 20 November 2008) <<https://www.govinfo.gov/content/pkg/CPRT-110SPRT48761/pdf/CPRT-110SPRT48761.pdf>> (Last accessed 15 May 2021)

United States Senate Select Committee on Intelligence, *Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program together with Foreword by Chairman Feinstein and Additional and Minority Views* (Senate Report 113-288, 9 December 2014) <<https://www.congress.gov/113/crpt/srpt288/CRPT-113srpt288.pdf>> (Last accessed 15 May 2021)

United States Senate, 'Treatment of Detainees in U.S. Custody' (*Congressional Record* 155:58, 21 April 2009)

<<https://www.congress.gov/111/crec/2009/04/21/CREC-2009-04-21-pt1-PgS4504-2.pdf>> (Last accessed 15 May 2021)

Yoo JC, 'Letter for Alberto R. Gonzales, Counsel to the President from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel' (August 1, 2002) <<https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug1.pdf>> (Last accessed 15 May 2021)

International Criminal Court Documents

Assembly of States Parties, 'Report of the Bureau on complementarity' (29 November 2019) ICC Doc ICC/ASP/18/25 <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-25-ENG.pdf> (Last accessed 15 May 2021)

International Criminal Court, *Elements of Crime* (International Criminal Court 2013) <<https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf>> (Last accessed 15 May 2021)

Office of the Prosecutor, 'Informal expert paper: The principle of complementarity in practice' (International Criminal Court, 2003) <<https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>> (Last accessed 15 May 2021)

– – 'Paper on some policy issues before the Office of the Prosecutor' (ICC, September 2003) <https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf> (Last accessed 15 May 2021)

– – 'OTP letter to senders re Iraq 9 February 2006' (International Criminal Court, 9 February 2006) <https://www.icc-cpi.int/nr/rdonlyres/04d143c8-19fb-466c-ab77-4cdb2fdebef7/143682/otp_letter_to_senders_re_iraq_9_february_2006.pdf> (Last accessed 15 May 2021)

– – 'Policy Paper on the Interests of Justice' (International Criminal Court, September 2007) <<https://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestsofjustice.pdf>> (Last accessed 15 May 2021)

– – 'Strategic Plan: 2016 – 2018' (International Criminal Court, 16 November 2015) <https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf> (Last accessed 15 May 2021)

– – 'Report on Preliminary Examinations 2016' (International Criminal Court, 14 November 2016) <https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf> (Last accessed 15 May 2021)

- – ‘Report on Preliminary Examination Activities 2017’ (International Criminal Court, 4 December 2017) <https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf> (Last accessed 15 May 2021)
- – ‘Report on Preliminary Examination Activities 2018’ (International Criminal Court, 5 December 2018) <<https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>> (Last accessed 15 May 2021)
- – ‘Strategic Plan: 2019-2021’ (International Criminal Court, 17 July 2019) <<https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf>> (Last accessed 15 May 2021)
- – ‘Report on Preliminary Examination Activities 2019’ (International Criminal Court, 5 December 2019) <<https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>> (Last accessed 15 May 2021), paras 167-68
- – ‘Situation in Iraq/UK: Final Report’ (Office of the Prosecutor, 9 December 2020) <<https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>> (Last accessed 15 May 2021)

Panel of Independent Experts, ‘Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report’ (ICC Assembly of States Parties, 30 September 2020) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf> (Last accessed 15 May 2021)

Secretariat of the Assembly of States Parties to the Rome Statute of the International Criminal Court, ‘Informal information session – 24 June 2020: Complementarity and the relationship between national jurisdictions and the Court’ (ICC Assembly of States Parties, 24 July 2020) <https://asp.icc-cpi.int/en_menus/asp/complementarity/Documents/Complementarity1%20Summary%2024Jul2020%201700.pdf> (Last accessed 25 July 2021)

United Nations Documents

Human Rights Committee, ‘Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: United Kingdom of Great Britain and Northern Ireland’ (30 July 2008) UN Doc CCPR/C/GBR/CO/6

- – ‘Information received from the United Kingdom of Great Britain and Northern Ireland on the implementation of the concluding observations of the Human

Rights Committee (CCPR/C/GBR/CO/6)' (3 November 2009) UN Doc
CCPR/C/GBR/CO/6/Add.1

-- 'Fourth periodic report: United States of America' (22 May 2012) UN Doc
CCPR/C/USA/4

-- 'Concluding observations on the fourth periodic report of the United States
of America' (23 April 2014) UN Doc CCPR/C/USA/CO/4

-- 'Information received from the United States of America on follow-up to the
concluding observations' (28 November 2017) UN Doc
CCPR/C/USA/CO/4/Add.1

-- 'General Comment No. 36 (2018) on article 6 of the International Covenant
on Civil and Political Rights, on the right to life' (30 October 2018) UN Doc
CCPR/C/GC/36

Human Rights Council, 'National report submitted in accordance with paragraph
5 of the annex to Human Rights Council resolution 16/21: United States of
America' (13 August 2020) UN Doc A/HRC/WG.6/36/US/1

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

Méndez JE, 'Report of the Special Rapporteur on torture and other cruel,
inhuman or degrading treatment or punishment, Juan E Méndez' (18 January
2012) UN Doc A/HRC/19/61

Office of the High Commissioner for Human Rights 'Istanbul Protocol Manual on
the Effective Investigation and Documentation of Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc
HR/P/PT/8/Rev.1

-- 'Rule-of-Law Tools for Post-Conflict States: Truth Commissions' (2006) UN
Doc HR/PUB/06/1

Permanent Mission of the United States of America, 'One-Year Follow-up
Response of the United States of America to Priority Recommendations of the
Human Rights Committee on its Fourth Periodic Report on Implementation of
the International Covenant on Civil and Political Rights' (Office of the High
Commissioner for Human Rights, 1 April 2015)

<https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CPR_FCO_USA_19957_E.pdf> (Last accessed 15 May 2021)

- Tuzmukhamedov B, 'Letter to Julian Braithwaite, dated 4 September 2020' (Office of the High Commissioner for Human Rights, 4 September 2020) <https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/GBR/INT_CAT_FUL_GBR_43019_E.pdf> (Last accessed 15 May 2021)
- United Kingdom Mission to the United Nations, 'Summary of observations made by the Representative of the United Kingdom of Great Britain and Northern Ireland on 3, 4, 5, 6 and 7 April 1995' <<http://www.legal-tools.org/doc/664ac1/pdf/>> (Last accessed 15 May 2021)
- United Nations Committee Against Torture, 'Consideration of Reports submitted by States Parties under Article 19 of the Convention: Initial reports of States parties due in 1995 Addendum, United States of America' (9 February 2000) UN Doc CAT/C/28/Add.5
- – 'Conclusions and recommendations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories' (10 December 2004) UN Doc CAT/C/CR/33/3
- United Nations Committee against Torture, 'General Comment No.2: Implementation of Article 2 by States Parties' (24 January 2008) UN Doc CAT/C/GC/2
- – 'General Comment No.3: Implementation of article 14 by States parties' (13 December 2012) UN Doc CAT/C/GC/3
- – 'Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, adopted by the Committee at its fiftieth session (6-31 May 2013)' (24 June 2013) UN Doc CAT/C/GBR/CO/5
- – 'Third to fifth periodic reports of States parties due in 2011: United States of America' (4 December 2013) UN Doc CAT/C/USA/3-5
- – 'Information received from the United Kingdom of Great Britain and Northern Ireland on follow-up to the concluding observations' (16 June 2014) UN Doc CAT/C/GBR/CO/5/Add.1
- – 'Concluding observations on the combined third to fifth periodic reports of the United States of America' (19 December 2014) UN Doc CAT/C/USA/CO/3-5
- United Nations Committee against Torture, 'Information received from the United States of America on follow-up to the concluding observations' (14 January 2016) UN Doc CAT/C/USA/CO/3-5/Add.1

– – ‘Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’ (7 June 2019) UN Doc CAT/C/GBR/CO/6 United Nations General Assembly, ‘United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court’ UN Doc A/CONF.183/13 (Vol II)

United Nations Security Council, ‘The rule of law and transitional justice in conflict and post-conflict societies’ (23 August 2004) UN Doc S/2004/616

– – ‘Letter dated 1 November 2010 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council’ (19 November 2010) UN Doc S/2010/588

– – ‘Report of the Secretary-General on the United Nations Mission in Colombia’ (23 December 2016) UN Doc S/2016/1095

– – ‘Letter Dated 29 March 2017 from the Secretary-General addressed to the President of the Security Council’ (21 April 2017) UN Doc S/2017/272

Reports

American Bar Association, ‘American Bar Association Report to the House of Delegates’ (American Bar Association, 9 August 2004)

<https://www.americanbar.org/content/dam/aba/administrative/international_law/torture8_04.pdf> (Last accessed 15 May 2021)

Amnesty International, ‘USA Crimes and Impunity’ (Amnesty International, April 2015)

<<https://www.amnesty.org/download/Documents/AMR5114322015ENGLISH.PDF>> (Last accessed 20 March 2021)

Center for Human Rights and Global Justice, Human Rights First and Human Rights Watch, ‘By the Numbers: Findings of the Detainee Abuse and Accountability Project’ (Human Rights Watch, April 2006)

<<https://www.hrw.org/sites/default/files/reports/ct0406webwcover.pdf>> (Last accessed 15 May 2021)

Hoffman DH, ‘Report to the Special Committee of the Board of Directors of the American Psychological Association: Independent Review Relating to APA

Ethics Guidelines, National Security Interrogations and Torture' (American Psychological Association, 4 September 2015)

<<https://www.apa.org/independent-review/revised-report.pdf>> (Last accessed 20 March 2021)

Human Rights Watch, 'No More Excuses: A Roadmap to Justice for CIA Torture' (Human Rights Watch, 1 December 2015)

<https://www.hrw.org/sites/default/files/report_pdf/us1215web.pdf> (Last accessed 15 May 2021)

Physicians for Human Rights and Human Rights First, 'Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality' (Physicians for Human Rights, August 2007) <<https://phr.org/wp-content/uploads/2007/08/leave-no-marks-1.pdf>> (Last accessed 15 May 2021)

Rendition Project, 'CIA Torture Unredacted: Chapter One' (Rendition Project, July 2019) <<https://www.therenditionproject.org.uk/documents/RDI/190710-TRP-TBIJ-CIA-Torture-Unredacted-Ch1.pdf>> (Last accessed 15 May 2021)

Hansard

HC Deb 2 March 1972 vol 832 cols 743-45

HC Deb 3 April 2001 vol 366 col 222

HC Deb 14 May 2008 vol 475 cols 60WS-61WS

HC Deb 21 July 2008 vol 479 col 65WS

HC Deb 25 November 2009 vol 501 col 82WS

HC Deb 1 March 2010 vol 506 cols 93WS-94WS

HC Deb 1 November 2010 vol 517 col 27WS

HC Deb 8 September 2011 vol 532 cols 571-73

HC Deb 26 March 2012 vol 542 cols 87WS-88WS

HC Deb 27 March 2014 vol 578 cols 29WS-30WS

HC Deb 17 December 2014 vol 589 col 1407-09

HC Deb 27 January 2016 vol 605 cols 203WH-204WH

HC Deb 7 January 2020 vol 669 col 663

HC Deb 23 September 2020 vol 680 cols 986-88, 992-94, 1001, 1009, 1022 and 1049-50

HC Deb 13 October 2020 vol 682 col 9WS

Overseas Operations (Service Personnel and Veterans) Bill Deb 6 October 2020 cols 63 and 72

Overseas Operations (Service Personnel and Veterans) Bill Deb 8 October 2020 cols 117-18, 120 and 124-25

Overseas Operations (Service Personnel and Veterans) Bill Deb 14 October 2020 cols 150, 183, 190-94, 204-06

Overseas Operations Bill (Service Personnel and Veterans) Bill Deb 20 October 2020 col 233

Explanatory Notes

Department for Constitutional Affairs, 'Explanatory Notes to the Inquiries Act 2005'

Foreign and Commonwealth Office, 'Explanatory Notes to the International Criminal Court Act 2001'

Journal Articles

Aceves WJ, 'United States v George Tenet: A Federal Indictment for Torture' (2015) 48(1) New York University Journal of International Law and Politics 1

Akande D, 'The Jurisdiction of the International Criminal Court over the Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 Journal of International Criminal Justice 618

Akhavan P, 'Complementarity Conundrums' (2016) 14 Journal of International Criminal Justice 1043

Alvarez JA, 'Torturing the Law' (2006) 37(2) Case Western Reserve Journal of International Law 175

Arsanjani MH, 'The International Criminal Court and National Amnesty Laws' (1999) 93 American Society of International Law Proceedings 65

Bates ES, 'Distorted Terminology: The UK's Closure of Investigations into Alleged Torture and Inhuman Treatment in Iraq' (2019) 68 International and Comparative Law Quarterly 719

- Birdsall A, 'The Monster That We Need to Slay – Global Governance, the United States, and the International Criminal Court' (2010) 16 *Global Governance* 451
- Bisset A, 'Rethinking the Powers of Truth Commissions in Light of the ICC Statute' (2009) 7 *Journal of International Criminal Justice* 963
- Brighton C, 'Avoiding Unwillingness: Addressing the Political Pitfalls Inherent in the Complementarity Regime of the International Criminal Court' (2012) 12 *International Criminal Law Review* 629
- Brown BS, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 *Yale Journal of International Law* 383
- Burke-White WW, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19 *Criminal Law Forum* 59
- Carson CR, 'The Military Commissions Act of 2006: How Its Inability to Curb Abusive Interrogations Threatens the Future Treatment of Detainees and the United States' Reputation' (2008) 57 *Emory Law Journal* 695
- Carter L, 'Torture and the War on Terror: The Need for Consistent Definitions and Legal Remedies' (2012) 6 *Journal of National Security Law and Policy* 291
- Cassese A, 'The ICTY: A Living and Vital Reality' (2004) 2 *Journal of International Criminal Justice* 585
- Cerone JP, 'Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals' (2007) 18(2) *European Journal of International Law* 277
- Clark K, 'Ethical Issues Raised by the OLC Torture Memorandum' (2005) 1 *Journal of National Security Law and Policy* 455
- Cormier M, 'Can the ICC Exercise Jurisdiction over US Nationals for Crimes Committed in the Afghanistan Situation?' (2018) 16 *Journal of International Criminal Justice* 1043
- Corn GS and VanLandingham RE, 'Strengthening American War Crimes Accountability' (2020) 70 *American University Law Review* 309
- Cryer R, 'Implementation of the International Criminal Court Statute in England and Wales' (2002) 51(3) *International and Comparative Law Quarterly* 733
– – and Bekou O, 'International Crimes and ICC Cooperation in England and Wales', (2007) 5 *Journal of International Criminal Justice* 441

- Dickinson LA, 'Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance' (2010) 104 *American Journal of International Law* 1
- El Zeidy M, 'The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422' (2002) 35 *Vanderbilt Journal of Transnational Law* 1503
- 'The Gravity Threshold under the Statute of the International Criminal Court' (2008) 19 *Criminal Law Forum* 35
- 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 *Michigan Journal of International Law* 869
- Fairlie MA, 'The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage' (2011) 29 *Berkeley Journal of International Law* 528
- Flores CL, 'Unfounded Allegations that John Yoo Violated His Ethical Obligations as a Lawyer' (2011) 25(1) *BYU Journal of Public Law* 1
- Ford S, 'Has President Trump Committed a War Crime by Pardoning War Criminals?' (2020) 35 *American University International Law Review* 757
- Gibson JL, 'The Contributions of Truth to Reconciliation: Lessons from South Africa' (2006) 50(3) *Journal of Conflict Resolution* 409
- Gioia F, 'State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 *Leiden Journal of International Law* 1095
- Gorski K, 'Nonjudicial Punishment in the Military: Why a Lower Burden of Proof Across All Branches is Unnecessary' (2013) 2 *National Law Security Review* 83
- Grady K, 'International Crimes in the courts of England and Wales' [2014] *Criminal Law Review* 693
- Graham LO and Connolly PR, 'Waterboarding: Issues and Lessons for Judge Advocates' (2013) 69 *Air Force Law Review* 65
- Hajjar L, 'The Afterlives of Torture: The Global Implications of Reactionary US Politics' (2019) 8(2) *State Crime* 164
- Hassanein AS, 'Physical and Legal Inability under Article 17(3) of the Rome Statute' (2015) 15 *International Criminal Law Review* 101
- Heller KJ, 'Radical Complementarity' (2016) 14 *Journal of International Criminal Justice* 637

- Hobel MWS, 'So Vast an Area of Legal Irresponsibility – The Superior Orders Defense and Good Faith Reliance on Advice of Counsel' (2011) 11 *Columbia Law Review* 574
- Hutchinson T and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83
- Jain N, 'A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court' (2005) 16(2) *European Journal of International Law* 239
- Jervis R, 'The Torture Blame Game' (2015) 94 *Foreign Affairs* 120
- Johnson DA, Mora A and Schmidt A, 'The Strategic Costs of Torture: How Enhanced Interrogation Hurt America' (2016) 95 *Foreign Affairs* 121
- Jurdi NN, 'The Complementarity Regime of the International Criminal Court in Practice: Is it Truly Serving the Purpose? Some Lessons from Libya' (2017) 30 *Leiden Journal of International Law* 199
- King C, 'The Future of Torture in the United States: The Army Field Manual on Interrogation's Compliance with the Convention against Torture' (2016) 51 *Texas Journal of International Law* 143
- Kleffner JK, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1(1) *Journal of International Criminal Justice* 86
- Koh HH, 'A World Without Torture' (2005) 43 *Columbia Journal of Transnational Law* 641
- – 'International Criminal Justice 5.0' (2013) 38(2) *Yale Journal of International Law* 525
- Ku J, 'The Wrongheaded and Dangerous Campaign to Criminalize Good Faith Legal Advice' (2009) 42 *Case Western Reserve Journal of International Law* 449
- Lavalle R, 'A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court' (2003) 14 *Criminal Law Forum* 195
- Luban D and Shue H, 'Mental Torture: A Critique of Erasures in US Law' (2012) 100 *Georgetown Law Journal* 823
- Markovic M, 'Can Lawyers Be War Criminals?' (2007) 20(2) *Georgetown Journal of Legal Ethics* 347

- Matheson MJ, 'The Amendment of the War Crimes Act' (2007) 101(1) *American Journal of International Law* 48
- May R and Powles S, 'Command responsibility – a new basis of criminal liability in English law?' [2002] *Criminal Law Review* 363
- Meernik J, 'Justice, Power and Peace: Conflicting Interests and the Apprehension of ICC Suspects' (2013) 13 *International Criminal Law Review* 169
- Megret F and Samson MG, 'Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials' (2013) 11 *Journal of International Criminal Justice* 571
- Newton MA, 'How the International Criminal Court Threatens Treaty Norms' (2016) 49 *Vanderbilt Journal of Transnational Law* 371
- Nowak M, 'What Practices Constitute Torture: US and UN Standards' (2006) 28 *Human Rights Quarterly* 809
- O'Callaghan D, 'Is the International Criminal Court the Way Ahead?' (2008) 8 *International Criminal Law Review* 533
- Ochs SL, 'The United States, the International Criminal Court, and the Situation in Afghanistan' (2019) 95(2) *Notre Dame Law Review Reflection* 89
- Parry JT, 'The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees' (2005) 6(2) *Melbourne Journal of International Law* 516
- Paust JJ, 'The U.S. and the ICC: No More Excuses' (2013) 12 *Washington University Global Studies Law Review* 563
- Pittman TW and Heaphy M, 'Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity before the International Criminal Court' (2008) 21 *Leiden Journal of International Law* 165
- Rasiah N, 'The Court-martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice' (2009) 7 *Journal of International Criminal Justice* 177
- Reeves S, 'The Burden of Proof in Nonjudicial Punishment: Why Beyond a Reasonable Doubt Makes Sense' [2005] 2005(11) *Army Lawyer* 28
- Reyes H, 'The worst scars are in the mind: psychological torture' (2007) 89(867) *International Review of the Red Cross* 591

- Robinson D, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14(3) *European Journal of International Law* 481
- Rodman KA, 'Justice as a Dialogue Between Law and Politics' (2014) 12 *Journal of International Criminal Justice* 437
- Roht-Arriaza N, 'Truth Commissions and Amnesties in Latin America: The Second Generation' (1998) 92 *American Society of International Law Proceedings* 313
- 'Just a Bubble? Perspectives on the Enforcement of International Criminal Law by National Courts' (2013) 11 *Journal of International Criminal Justice* 537
- Romm J, 'No Home in this World: The Case against John Yoo before the International Criminal Court' (2020) 20 *International Criminal Law Review* 862
- Ross J, 'Black letter abuse: the US legal response to torture since 9/11' (2007) 89(867) *International Review of the Red Cross* 561
- Rowe P, 'The criminal liability of a British soldier merely for participating in the Iraq war 2003: a response to Chilcot evidence' [2010] *Criminal Law Review* 752
- Sandholtz W, 'Closing off the Torture Option', (2009) 18 *Southern California Interdisciplinary Law Journal* 589
- Schabas WA, 'Complementarity in Practice: Some Uncomplimentary Thoughts' (2008) 19 *Criminal Law Forum* 5
- Scharf MP, 'International Law and the Torture Memos' (2009) 42 *Case Western Reserve Journal of International Law* 321
- 'The Torture Lawyers' (2010) 20 *Duke Journal of Comparative and International Law* 389
- Scheffer D, 'The United States and the International Criminal Court' (1999) 93 *American Journal of International Law* 12
- 'Closing the Impunity Gap in U.S. Law' (2009) 8(1) *Northwestern Journal of International Human Rights* 30
- Schmidt A and Sikkink K, 'Breaking the Ban? The Heterogenous Impact of US Contestation of the Torture Norm' (2019) 4(1) *Journal of Security Studies* 105
- Schwartz EP, 'The United States and the International Criminal Court: The Case for "Dexterous Multilateralism"' (2003) 4(1) *Chicago Journal of International Law* 223

- Seibert-Fohr A, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions' (2003) 7 Max Planck Yearbook of United Nations Law 553
- Sifton J, 'United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps' (2006) 43 Harvard Journal on Legislation 487
- Smith SE, 'Inventing the Laws of Gravity: The ICC's Initial *Lubanga* Decision and its Regressive Consequences' (2008) 8 International Criminal Law Review 331
- Sriram CL and Brown S, 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact' (2012) 12 International Criminal Law Review 219.
- Ssenyonjo M, 'The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty?' (2007) 7 International Criminal Law Review 361
- Stahn C, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor' (2001) 95 American Journal of International Law 952
- Stahn C, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 Journal of International Criminal Justice 695
- Stahn C, 'Complementarity: A Tale of Two Notions' (2008) 19 Criminal Law Forum 87
- Terracino JB, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC' (2007) 5 Journal of International Criminal Justice 421
- Trahan J, 'The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices' (2013) 24 Criminal Law Forum 417
- van der Wilt H, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court' (2008) 8 International Criminal Law Review 229
- Wilde ML, 'Incomplete Justice: Unintended Consequences of Military Nonjudicial Punishment' (2007) 60 Air Force Law Review 115
- Williams A, 'The Iraq Abuse Allegations and the Limits of UK Law' [2018] Public Law 461

Internet Sources

Ackerman S, 'Three senior officials lose their jobs at APA after US torture scandal' (*The Guardian*, 14 July 2015) <<https://www.theguardian.com/us-news/2015/jul/14/apa-senior-officials-torture-report-cia>> (Last accessed 15 May 2021)

Akram S and Rona G, 'Why the Executive Order on the ICC is Unconstitutional and Self-Defeating' (*Opinio Juris*, 13 August 2020) <<http://opiniojuris.org/2020/08/13/why-the-executive-order-on-the-icc-is-unconstitutional-and-self-defeating/>> (Last accessed 15 May 2021)

Allegretti A, 'Home Office admits video attacking lawyers who help migrants was wrong' (*Sky News*, 27 August 2020) <<https://news.sky.com/story/home-office-admits-video-attacking-lawyers-who-help-migrants-was-wrong-but-wont-remove-it-12058005>> (Last accessed 15 May 2021)

American Civil Liberties Union, 'Why a Criminal Investigation is Necessary' (American Civil Liberties Union) <<https://www.aclu.org/other/why-criminal-investigation-necessary?redirect=why-criminal-investigation-necessary>> (Last accessed 15 May 2021)

– – 'CIA Torture Psychologists Settle Lawsuit' (American Civil Liberties Union, 17 August 2017) <<https://www.aclu.org/press-releases/cia-torture-psychologists-settle-lawsuit>> (Last accessed 15 May 2021)

American Psychological Association, 'Subject: Release of the Final Report of the Special Investigator' (American Psychological Association, 11 July 2015) <<https://www.apa.org/independent-review/final-report-message>> (Last accessed 15 May 2021)

– – 'APA Reaction to Settlement of Torture Case Against Psychologists Mitchell, Jessen' (American Psychological Association, 17 August 2017) <<https://www.apa.org/news/press/releases/2017/08/torture-settlement>> (Last accessed 15 May 2021)

Amnesty International UK, 'Baha Mousa: 'Those responsible must be held accountable for their actions'' (Amnesty International UK, 8 September 2011) <<https://www.amnesty.org.uk/press-releases/baha-mousa-those-responsible-must-be-held-held-accountable-their-actions>> (Last accessed 15 May 2021)

– – ‘UK: Military prosecutions bill will have a “devastating impact on reputation of armed forces”’ (Amnesty International UK, 18 March 2020)

<<https://www.amnesty.org.uk/press-releases/uk-military-prosecutions-bill-will-have-devastating-impact-reputation-armed-forces>> (Last accessed 15 May 2021)

– – and Others, ‘Joint Response to UK government plans not to prosecute acts of torture after five years’ (REDRESS, 18 March 2020)

<<https://redress.org/news/joint-response-to-uk-government-plans-not-to-prosecute-acts-of-torture-after-five-years/>> (Last accessed 15 May 2021)

Amnesty International, ‘ICC decision on UK military in Iraq rewards obstructionism’ (Amnesty International, 10 December 2020)

<<https://www.amnesty.org/en/latest/news/2020/12/icc-decision-on-uk-military-in-iraq-rewards-obstructionism/>> (Last accessed 15 May 2021)

– – ‘USA: Senate summary report on CIA detention programme must not be end of story’ (Amnesty International, 9 December 2014)

<<https://www.amnesty.org/en/latest/news/2014/12/usa-senate-summary-report-cia-detention-programme-must-not-be-end-story/>> (Last accessed 15 May 2021)

Attorney General’s Office and Grieve D, ‘Statement on ICC preliminary examination into Iraq allegations’ (Attorney General’s Office, 13 May 2014)

<<https://www.gov.uk/government/news/statement-on-icc-preliminary-examination-into-iraq-allegations>> (Last accessed 15 May 2021)

Axworthy L, ‘Notes for an Address by the Honourable Lloyd Axworthy Minister of Foreign Affairs, Canada’ (Legal Tools, 15 June 1998) <<https://www.legal-tools.org/doc/7313d2/pdf>> (Last accessed 25 July 2021)

Azmy B, ‘To prevent torture, prosecute torture’ (MSNBC, 8 December 2014)

<<https://www.msnbc.com/msnbc/cia-report-prevent-torture-prosecute-torture-msna474961>> (Last accessed 15 May 2021)

Baldwin C, ‘Beyond Baha Mousa’ (*The Guardian*, 8 September 2011)

<<https://www.theguardian.com/law/2011/sep/08/baha-mousa-inquiry-iraq-britain-law>> (Last accessed 15 May 2021)

– – ‘UK Bill a License for Military Crimes?’ (Human Rights Watch, 20 March 2020) <<https://www.hrw.org/news/2020/03/20/uk-bill-license-military-crimes>>

(Last accessed 15 May 2021)

- – ‘The ICC Prosecutor Office’s Cop-Out on UK Military Crimes in Iraq’ (Opinio Juris, 18 December 2020) <<http://opiniojuris.org/2020/12/18/the-icc-prosecutor-offices-cop-out-on-uk-military-crimes-in-iraq/>> (Last accessed 15 May 2021)
- Bates ES, ‘Legislating by Soundbite: The Overseas Operations (Service Personnel and Veterans) Bill’ (EJIL:Talk!, 18 September 2020) <<https://www.ejiltalk.org/legislating-by-soundbite-the-overseas-operations-service-personnel-and-veterans-bill/>> (Last accessed 15 May 2021)
- BBC News, ‘William Hague rejects Iraq ‘abuse’ complaint to ICC’ (BBC News, 12 January 2014) <<https://www.bbc.co.uk/news/uk-25703723>> (Last accessed 15 May 2021)
- Beale J, ‘Iraq War: All but one war crimes claim against British soldiers dropped’ (BBC News, 2 June 2020) <<https://www.bbc.co.uk/news/uk-52885615>> (Last accessed 15 May 2021)
- Bell AM and Gift T, ‘War Crime Pardons and What They Mean for the Military’ (War on the Rocks, 5 December 2019) <<https://warontherocks.com/2019/12/war-crime-pardons-and-what-they-mean-for-the-military/>> (Last accessed 15 May 2021)
- Bellinger J, ‘The International Criminal Court and the Trump Administration’ (Lawfare, 27 March 2018) <<https://www.lawfareblog.com/international-criminal-court-and-trump-administration>> (Last accessed 15 May 2021)
- – ‘The Trump Administration Throws Down the Gauntlet to the ICC. The Court Should Decline the Challenge’ (Lawfare, 10 September 2018) <<https://www.lawfareblog.com/trump-administration-throws-down-gauntlet-icc-court-should-decline-challenge>> (Last accessed 15 May 2021)
- Borger J, ‘US imposes sanctions on top international criminal court officials’ (*The Guardian*, 2 September 2020) <<https://www.theguardian.com/law/2020/sep/02/us-sanctions-international-criminal-court-fatou-bensouda>> (Last accessed 15 May 2021)
- Bowcott O and Norton-Taylor R, ‘Paratroopers cleared of murdering Iraqi after judge says there is no case to answer’ (*The Guardian*, 4 November 2005) <<https://www.theguardian.com/uk/2005/nov/04/military.iraq>> (Last accessed 15 May 2021)
- – ‘ICC abandons inquiry into alleged British war crimes in Iraq’ (*The Guardian*, 9 December 2020) <<https://www.theguardian.com/uk-news/2020/dec/09/icc->

abandons-inquiry-into-alleged-british-war-crimes-in-iraq> (Last accessed 15 May 2021)

Centre for Military Justice, 'Don't believe the hype. Service Personnel must be bound by – and protected by – the Human Rights Act' (Centre for Military Justice, 18 March 2020) <<https://centreformilitaryjustice.org.uk/dont-believe-the-hype-service-personnel-must-be-bound-by-and-protected-by-the-human-rights-act/>> (Last accessed 15 May 2021)

– – 'Written evidence from the Centre for Military Justice (OOB0017)' (Joint Committee on Human Rights, 11 September 2020) <<https://committees.parliament.uk/writtenevidence/11552/pdf>> (Last accessed 20 March 2021)

Cerone J, 'The Military Commissions Act of 2006: Examining the Relationship between the International Law of Armed Conflict and US Law' (2006) 10(30) American Society of International Law Insights <<https://www.asil.org/insights/volume/10/issue/30/military-commissions-act-2006-examining-relationship-between>> (Last accessed 15 May 2021)

Cherry G, 'Ex-CIA contractor gets 8 years for prisoner abuse' (Reuters, 14 February 2007) <<https://www.reuters.com/article/us-afghan-usa-cia/ex-cia-contractor-gets-8-years-for-prisoner-abuse-idUSN1322250620070214>> (Last accessed 15 May 2021)

Cherry J, 'Joanna Cherry: Decriminalising torture does our soldiers a disservice' (*The Herald*, 22 September 2020) <<https://www.heraldscotland.com/news/18736205.joanna-cherry-decriminalising-torture-soldiers-disservice/>> (Last accessed 15 May 2021)

Chkheidze P, 'Statement by H.E. Dr. Peter Chkheidze, Permanent Representative of Georgia to the United Nations' (Legal Tools, 18 June 1998) <<https://www.legal-tools.org/doc/bd8b14/pdf>> (Last accessed 25 July 2021)

Clarke M, 'The UK's Overseas Operations Bill: Good Questions, Wrong Answers' (Royal United Services Institute, 7 October 2020) <<https://rusi.org/commentary/uks-overseas-operations-bill-good-questions-wrong-answers>> (Last accessed 15 May 2021)

Close J, 'The ICC refrains from affirming a general ban on amnesties in the Gaddafi admissibility decision' (International Law Blog, 20 April 2020) <<https://internationallaw.blog/2020/04/20/the-icc-refrains-from-affirming-a->

[general-ban-on-amnesties-in-the-gaddafi-admissibility-appeal-decision/](#) (Last accessed 15 May 2021)

Cole D, 'On Rereading the Torture Report – SSCI Focus Gave Too Many Perpetrators a Pass' (Just Security, 22 February 2015)

<https://www.justsecurity.org/20267/rereading-torture-report-ssci-focus-gave-perpetrators-pass/> (Last accessed 15 May 2021)

Conservative and Unionist Party, 'The Conservative and Unionist Party Manifesto 2017' (Conservative Party, 2017)

<https://web.archive.org/web/20170603020303/https://s3.eu-west-2.amazonaws.com/manifesto2017/Manifesto2017.pdf> (Last accessed 15 May 2021)

– – 'The Conservative and Unionist Party Manifesto 2019' (Conservative Party, 2019) [https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf](https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conervative%202019%20Manifesto.pdf) (Last accessed 15 May 2021)

Conservative Party, 'The Conservative Party Manifesto 2015' (Conservative Party, 2015) <https://web.archive.org/web/20150414212623/https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf> (Last accessed 15 May 2021)

Crown Prosecution Service, 'The Code for Crown Prosecutors' (Crown Prosecution Service, 26 October 2018)

<https://www.cps.gov.uk/publication/code-crown-prosecutors> (Last accessed 15 May 2021)

– – 'Offences against the Person, incorporating the Charging Standard' (Crown Prosecution Service, 6 January 2020) <https://www.cps.gov.uk/legal-guidance/offences-against-person-incorporating-charging-standard> (Last accessed 15 May 2021)

– – 'Written evidence from the Crown Prosecution Service (CPS) (OOB0032)' (Joint Committee on Human Rights, 11 September 2020)

<https://committees.parliament.uk/writtenevidence/12288/pdf> (Last accessed 15 May 2021)

Davis D, 'Plan to excuse past torture by soldiers is a grave mistake' (*The Times*, 21 September 2020) <https://www.thetimes.co.uk/article/plan-to-excuse-past->

torture-by-soldiers-is-a-grave-mistake-5pgztx7bb> (Last accessed 15 May 2021)

Dempsey M, 'Tweet, dated 21 May 2019' (Twitter, 21 May 2019)

<https://twitter.com/Martin_Dempsey/status/1130809276191035392> (Last accessed 15 May 2021)

Dini L, 'Statement by H.E. Mr. Lamberto Dini, Minister of Foreign Affairs of the Republic of Italy (Legal Tools, 14 July 1998) <<https://www.legal-tools.org/doc/4b9698/pdf>> (Last accessed 25 July 2021)

Dinnen C, 'The real reason the MoD pulled the plug on Iraq War probe today' (ITV News, 10 February 2017) <<https://www.itv.com/news/2017-02-10/the-real-reason-the-mod-shut-probe-into-iraq-war-troops>> (Last accessed 15 May 2021)

Elgot J, 'Theresa May will oppose 'vexatious' allegations against Iraq UK troops' (*The Guardian*, 21 September 2016)

<<https://www.theguardian.com/world/2016/sep/21/theresa-may-will-oppose-vexatious-allegations-against-iraq-uk-troops>> (Last accessed 15 May 2021)

Equality and Human Rights Commission, 'Briefing: Overseas Operations (Service Personnel and Veterans) Bill House of Commons, Second Reading' (Equality and Human Rights Commission, September 2020)

<https://www.equalityhumanrights.com/sites/default/files/parliamentary-briefing-overseas-operations-bill-house-of-commons-second-reading-september-2020_0.docx> (Last accessed 15 May 2021)

Ernesto Londoño, 'Army officer convicted in shooting deaths of 2 Afghans' (*Washington Post*, 2 August 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> (Last accessed 15 May 2021)

Esdaile C, 'Overseas Operations Bill: True Freedom Requires the Rule of Law and Justice' (REDRESS, 17 June 2020) <<https://redress.org/news/overseas-operations-bill-true-freedom-requires-the-rule-of-law-and-justice/>> (Last accessed 15 May 2021)

Esper MT, 'Remarks by Secretary of Defense Mark T. Esper at ICC Press Conference' (United States Department of Defense, 11 June 2020)

<<https://www.defense.gov/Newsroom/Speeches/Speech/Article/2216306/remar>

ks-by-secretary-of-defense-mark-t-esper-at-icc-press-conference/> (Last accessed 15 May 2021)

European Center for Constitutional and Human Rights and Public Interest Lawyers, 'Communication to the Office of the Prosecutor of the International Criminal Court: The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008'

(European Center for Constitutional and Human Rights, 10 January 2014)

<https://www.ecchr.eu/fileadmin/Juristische_Dokumente/January_2014_Communication_by_ECCHR_and_PIL_to_ICC_OTP_re_Iraq_UK_public_version.pdf> (Last accessed 15 May 2021)

– – 'Follow-up communication by the European Center for Constitutional and Human Rights to the Office of the Prosecutor of the International Criminal Court' (ECCHR, 31 July 2019)

<https://www.ecchr.eu/fileadmin/Juristische_Dokumente/ECCHR_Follow_Up_Communication_to_OTP_War_crimes_by_UK_forces_in_Iraq_July_2019.pdf>

(Last accessed 15 May 2021)

– – 'Negative Decision by the ICC Prosecutor is a Severe Blow to Iraqi Torture Victims and International Justice' (European Center for Constitutional and Human Rights, 9 December 2020) <<https://www.ecchr.eu/en/press-release/war-crimes-by-uk-forces-iraq-negative-decision-icc/>> (Last accessed 15 May 2021)

Fallon M, 'Members of our armed forces were victims of a charismatic conman who exploited vulnerabilities in the legal system' (*Daily Mail*, 10 February 2017)

<<https://www.dailymail.co.uk/news/article-4213576/Troops-victims-charismatic-conman.html>> (Last accessed 15 May 2021)

Feinstein D, 'A Reply to Amy Zegart on the SSCI Study of the CIA's Detention and Interrogation Program' (Lawfare, 21 December 2015)

<<https://www.lawfareblog.com/reply-amy-zegart-ssci-study-cias-detention-and-interrogation-program>> (Last accessed 15 May 2021)

Ferstman C, 'Why the ICC examination into Torture and other abuses by UK soldiers in Iraq must continue' (openDemocracy, 16 July 2017)

<<https://www.opendemocracy.net/en/opendemocracyuk/why-icc-examination-into-torture-and-other-abuses-by-uk-soldiers-in-iraq-must-cont/>> (Last accessed 15 May 2021)

– – Hansen TO and Arajärvi N, 'The UK Military in Iraq: Efforts and Prospects for Accountability for International Crimes Allegations', (1 October 2018) <https://www1.essex.ac.uk/hrc/documents/THE_UK_MILITARY_IN_IRAQ_1Oct2018.pdf> (Last accessed 15 May 2021)

Foreign, Commonwealth and Development Office, 'Her Honour Judge Joanna Korner: UK Candidate for the International Criminal Court Judicial Elections' (Foreign, Commonwealth and Development Office) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927986/Judge-Korner-campaign-brochure-for-International-Criminal-Court-judicial-elections.pdf> (Last accessed 15 May 2021)

– – and Jonathan Allen, 'Promoting international criminal justice and the rule of law' (Foreign, Commonwealth and Development Office, 2 November 2020) <<https://www.gov.uk/government/speeches/promoting-international-criminal-justice-and-the-rule-of-law>> (Last accessed 15 May 2021)

– – and Dominic Raab, 'Election of Judge Joanna Korner: Foreign Secretary Statement: December 2020' (Foreign, Commonwealth and Development Office, 18 December 2020) <<https://www.gov.uk/government/news/election-of-judge-joanna-korner-foreign-secretary-statement-december-2020>> (Last accessed 15 May 2021)

Freedom from Torture and Others, 'Letter to David Cameron Re Ongoing IHAT investigations' (27 January 2016) <<https://redress.org/wp-content/uploads/2017/12/ngo-letter-to-cameron-270116.pdf>> (Last accessed 15 May 2021)

– – 'Senior military officials write to the Prime Minister' (Freedom from Torture, 18 September 2020) <<https://www.freedomfromtorture.org/news/senior-military-officials-write-to-the-prime-minister>> (Last accessed 15 May 2021)

Freedom House, 'Freedom in the World 2020: Central African Republic' (Freedom House) <<https://freedomhouse.org/country/central-african-republic/freedom-world/2020>> (Last accessed 15 May 2021)

– – 'Freedom in the World 2020: Democratic Republic of Congo' (Freedom House) <<https://freedomhouse.org/country/democratic-republic-congo/freedom-world/2020>> (Last accessed 15 May 2021)

- – ‘Freedom in the World 2020: Libya’ (Freedom House)
<<https://freedomhouse.org/country/libya/freedom-world/2020>> (Last accessed 15 May 2021)
- – ‘Freedom in the World 2020: United States’ (Freedom House)
<<https://freedomhouse.org/country/united-states/freedom-world/2020>> (Last accessed 15 May 2021)
- – ‘Freedom in the World: United Kingdom’ (Freedom House)
<<https://freedomhouse.org/country/united-kingdom/freedom-world/2020>> (Last accessed 15 May 2021)
- Frlec B, ‘Statement by H.E. Dr Boris Frlec, Minister of Foreign Affairs of the Republic of Slovenia at the Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, 15 June 1998 in Rome’ (Legal Tools, 15 June 1998) <<https://www.legal-tools.org/doc/f29d1f/pdf>> (Last accessed 25 July 2021)
- Gatti G, ‘Speech of His Excellency Gabriele Gatti Secretary of State for Foreign Affairs of the Republic of San Marino’ (Legal Tools, 17 June 1998)
<<https://www.legal-tools.org/doc/379316/pdf>> (Last accessed 25 July 2021)
- Gearty C, ‘The Overseas Operations Bill: a licence for atrocity’ (Prospect Magazine, 25 September 2020)
<<https://www.prospectmagazine.co.uk/politics/overseas-operations-bill-armed-forces-military-human-rights-law-labour-party>> (Last accessed 15 May 2021)
- Gibbons-Neff T, ‘Army Charges Special Forces Soldier in 2010 Killing of Afghan’ (*New York Times*, 14 December 2018)
<<https://www.nytimes.com/2018/12/14/us/politics/mathew-golsteyn-special-forces-murder-charges.html>> (Last accessed 15 May 2021)
- Goodwin-Hudson M, ‘Written evidence from Mark Goodwin-Hudson (OOB022)’ (Joint Committee on Human Rights, 11 September 2020)
<<https://committees.parliament.uk/writtenevidence/11592/pdf>> (Last accessed 15 May 2021)
- Greene A, ‘Special investigator appointed to prosecute Australian soldiers accused of Afghanistan war crimes’ (ABC News, 12 November 2020)
<<https://www.abc.net.au/news/2020-11-12/prime-minister-update-defence-war-crimes-report/12875570>> (Last accessed 25 July 2021)

Grieve D, 'Military prosecutions bill creates more problems than it fixes' (*The Times*, 26 March 2020) <<https://www.thetimes.co.uk/article/military-prosecutions-bill-creates-more-than-problems-than-it-fixes-dn2t3zclld>> (Last accessed 15 May 2021)

Guilfoyle D, 'Is the International Criminal Court destined to pick fights with non-state parties?' (EJIL:Talk!, 14 July 2020) <<https://www.ejiltalk.org/is-the-international-criminal-court-destined-to-pick-fights-with-non-state-parties/>> (Last accessed 15 May 2021)

Haberman M and Schmidt MS, 'Trump Pardons Two Russia Inquiry Figures and Blackwater Guards' (New York Times, 22 December 2020) <<https://www.nytimes.com/2020/12/22/us/politics/trump-pardons.html>> (Last accessed 15 May 2021)

Halonen T, 'Statement by H.E. Ms Tarja Halonen Minister for Foreign Affairs Finland at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (Legal Tools, 17 June 1998) <<https://www.legal-tools.org/doc/41c929/pdf>> (Last accessed 25 July 2021)

Hansen TO, 'Complementarity (in)action in the UK?' (EJIL:Talk!, 7 December 2018) <<https://www.ejiltalk.org/complementarity-inaction-in-the-uk/>> (Last accessed 15 May 2021)

Harman H, 'Ministers must not attack independent legal professionals – letter to the Attorney General' (Harriet Harman, 13 July 2017) <https://www.harrietharman.org/ministers_must_not_attack_independent_legal_professionals_the_times> (Last accessed 15 May 2021)

Hathaway O, 'Reengaging on Treaties and Other International Agreements (Part I): President Donald Trump's Rejection of International Law' (Just Security, 2 October 2020) <<https://www.justsecurity.org/72656/reengaging-on-treaties-and-other-international-agreements-part-i-president-donald-trumps-rejection-of-international-law/>> (Last accessed 15 May 2021)

Hattem J, 'DOJ won't reopen torture probe after CIA report' (The Hill, 10 December 2014) <<https://thehill.com/policy/defense/226603-justice-department-wont-reopen-torture-probes>> (Last accessed 15 May 2021)

Hawke SJ, 'How the UK government could effectively decriminalise torture in 3 easy steps' (Reprieve, 11 September 2020)

<<https://reprieve.org/uk/2020/09/11/how-the-uk-government-could-effectively-decriminalise-torture-in-3-easy-steps/>> (Last accessed 15 May 2021)

Hawkes S, 'Justice Secretary Liz Truss declares war on tank-chasing lawyers and vows to stop taxpayers' cash funding their claims' (*The Sun*, 3 October 2016) <<https://www.thesun.co.uk/news/1898618/justice-secretary-liz-truss-declares-war-on-tank-chasing-lawyers-and-vows-to-stop-taxpayers-cash-funding-their-claims/>> (Last accessed 15 May 2021)

Hawkins K, 'We Can't "Look Forward" on the Trump Administration's Abuses' (Just Security, 11 December 2020) <<https://www.justsecurity.org/73825/we-cant-look-forward-on-the-trump-administrations-abuses/>> (Last accessed 15 May 2021)

Heller KJ, 'The ACLU Endorses Blanket Amnesty for Torture' (Opinio Juris, 9 December 2014) <<http://opiniojuris.org/2014/12/09/aclu-endorses-blanket-amnesty-torture/>> (Last accessed 15 May 2021)

-- 'The Nine Words that (Wrongly) Doomed the Iraq Investigation' (Opinio Juris, 10 December 2020) <<http://opiniojuris.org/2020/12/10/the-nine-words-that-wrongly-doomed-the-iraq-investigation/>> (Last accessed 15 May 2021)

-- 'Article 18 and the Iraq Declination' (Opinio Juris, 12 December 2020) <<http://opiniojuris.org/2020/12/12/article-18-and-the-iraq-declination/>> (Last accessed 15 May 2021)

High Representative of the European Union for Foreign Affairs and Security Policy, 'Toolkit for Bridging the gap between international and national justice' (European Commission, 31 January 2013)

<<https://data.consilium.europa.eu/doc/document/ST-6783-2013-INIT/en/pdf>> (Last accessed 25 July 2021)

House of Commons Defence Sub-Committee, 'New inquiry: Support for Service personnel subject to judicial processes' (UK Parliament, 28 April 2016)

<<https://old.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/defencesubcommittee/news/mod-support-for-personnel-launch-15-16/>> (Last accessed 15 May 2021)

Human Rights First, 'Gen. Krulak Statement on Trump's Military Pardons' (Human Rights First, 15 November 2019)

<<https://www.humanrightsfirst.org/press-release/gen-krulak-statement-trumps-military-pardons>> (Last accessed 15 May 2021)

Human Rights Watch, 'US: Senate Report Slams CIA Torture, Lies' (Human Rights Watch, 10 December 2014) <<https://www.hrw.org/news/2014/12/10/us-senate-report-slams-cia-torture-lies>> (Last accessed 15 May 2021)

– – 'United Kingdom: ICC Prosecutor Ends Scrutiny of Iraq Abuses' (Human Rights Watch, 10 December 2020)

<<https://www.hrw.org/news/2020/12/10/united-kingdom-icc-prosecutor-ends-scrutiny-iraq-abuses>> (Last accessed 15 May 2021)

Insight, 'Army 'covered up torture and child murder' in the Middle East' (*The Sunday Times*, 17 November 2019) <<https://www.thetimes.co.uk/article/army-covered-up-torture-and-child-murder-bfdc5rsmw>> (Last accessed 15 May 2021)

– – 'British Army major 'faked witness testimony to coverup killing of Iraqi policeman' (*The Sunday Times*, 17 November 2019)

<<https://www.thetimes.co.uk/article/british-army-major-faked-witness-testimony-to-cover-up-killing-of-iraqi-policeman-mczl8dpg5>> (Last accessed 15 May 2021)

– – 'Revealed: the evidence of war crimes ministers tried to bury' (*The Sunday Times*, 17 November 2019) <<https://www.thetimes.co.uk/past-six-days/2019-11-17/news/revealed-the-evidence-of-war-crimes-ministers-tried-to-bury-6x2fb63ts>> (Last accessed 15 May 2021)

International Committee of the Red Cross, 'Rule 90. Torture and Cruel, Inhuman or Degrading Treatment' (International Humanitarian Law Database) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule90> (Last accessed 15 May 2021)

– – 'Rule 158. Prosecution of War Crimes' (International Humanitarian Law Database) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158> (Last accessed 15 May 2021)

– – 'Rule 160. Statutes of limitation' (International Humanitarian Law Database) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule160> (Last accessed 15 May 2021)

International Criminal Court, 'Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq' (International Criminal Court, 13 May 2014) <<https://www.icc-cpi.int/pages/item.aspx?name=otp-statement-iraq-13-05-2014>> (Last accessed 15 May 2021)

– – ‘Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People’s Army’ (International Criminal Court, 1 September 2016) <<https://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia>> (Last accessed 15 May 2021)

– – ‘Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom’ (International Criminal Court, 9 December 2020) <<https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk>> (Last accessed 15 May 2021)

Jaffer J, ‘Those who approved torture shouldn’t be above the law’ (MSNBC, 12 December 2014) <<https://www.msnbc.com/msnbc/those-who-approved-torture-shouldnt-be-above-the-law-msna479686>> (Last accessed 15 May 2021)

Jarvis D, ‘The Overseas Operations Bill is damaging to both our troops and our international standing’ (The House, 23 September 2020) <<https://www.politicshome.com/thehouse/article/overseas-operations-bill-is-damaging-to-both-our-troops-and-our-international-standing>> (Last accessed 15 May 2021)

Jensen F, ‘Statement by H.E. Mr. Frank Jensen, Minister of Justice of Denmark’ (Legal Tools, 18 June 1998) <<https://www.legal-tools.org/doc/a1ae64/pdf>> (Last accessed 25 July 2021)

Johnny for Plymouth, ‘MP secures Defence Committee inquiry into IHAT investigations’ (Johnny for Plymouth, 5 February 2016) <<https://www.johnnyforplymouth.co.uk/mp-secures-defence-committee-inquiry-into-ihat-investigations/>> (Last accessed 15 May 2021)

Johnson D and Schmitt MN, ‘The Duty to Investigate War Crimes’ (Lieber Institute, 22 December 2020) <<https://lieber.westpoint.edu/duty-investigate-war-crimes/>> (Last accessed 25 July 2021)

Jorgensen M, ‘The Afghanistan Investigation and the International Legal Order’ (Lawfare, 6 April 2020) <<https://www.lawfareblog.com/afghanistan-investigation-and-international-legal-order>> (Last accessed 15 May 2021).

Kaslow N, 'The Psychology of Torture' (The Mark News, 22 December 2014) <<http://www.themarknews.com/2014/12/22/the-psychology-of-torture/>> (Last accessed 15 May 2021)

Kersten M, 'Crossing the Line – Trump Approves Sanctions against Staff at the ICC' (Justice in Conflict, 18 June 2020) <<https://justiceinconflict.org/2020/06/18/crossing-the-line-trump-approves-sanctions-against-staff-at-the-icc/>> (Last accessed 15 May 2021)

Knaus C, 'Australian special forces involved in murder of 39 Afghan civilians, war crimes report alleges' (The Guardian, 19 November 2020) <<https://www.theguardian.com/australia-news/2020/nov/19/australian-special-forces-involved-in-of-39-afghan-civilians-war-crimes-report-alleges>> (Last accessed 25 July 2021)

Labuda PI, 'A Neo-Colonial Court for Weak States? Not Quite. Making Sense of the International Criminal Court's Afghanistan Decision' (EJIL:Talk!, 13 April 2019) <<https://www.ejiltalk.org/a-neo-colonial-court-for-weak-states-not-quite-making-sense-of-the-international-criminal-courts-afghanistan-decision/>> (Last accessed 15 May 2021)

Law Society, 'Attacks on the legal profession undermine the rule of law' (Law Society, 27 August 2020) <<https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/attacks-on-the-legal-profession-undermine-the-rule-of-law>> (Last accessed 15 May 2021)

– – 'Parliamentary briefing Overseas Operations (Service Personnel and Veterans) Bill – House of Commons second reading' (Law Society, 23 September 2020) <<https://www.lawsociety.org.uk/topics/human-rights/parliamentary-briefing-overseas-operations-bill-house-of-commons-second-reading>> (Last accessed 15 May 2021)

– – 'Parliamentary briefing: Overseas Operations (Service Personnel and Veterans) Bill: Second Reading Debate – House of Commons' (Law Society, 23 September 2020) <<https://tlsprdsitecore.azureedge.net/-/media/files/topics/human-rights/law-society-briefing-overseas-operations-bill-commons-second-reading-23-september-2020.pdf?rev=fab6285cafdb410189e4a2b277b99e99&hash=33DB51D3AB9BC E5081C06076B6DB9202>> (Last accessed 20 March 2021)

Letters to the Editor, 'Letters to the Editor: EU double standard on trade deal talks' (*The Sunday Times*, 7 June 2020)

<<https://www.thetimes.co.uk/article/letters-to-the-editor-eu-double-standard-on-trade-deal-talks-b3p2tkgq6>> (Last accessed 15 May 2021)

Liberty, 'Liberty's Submission to the Joint Committee on Human Rights' Inquiry into the Overseas Operations (Service Personnel and Veterans) Bill' (Liberty, September 2020) <<https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/02/LIBERTY-SUBMISSION-JCHR-INQUIRY-INTO-THE-OVERSEAS-OPERATIONS-BILL-SEPTEMBER-2020.pdf>> (Last accessed 15 May 2021)

– – 'Liberty: The Overseas Operations Bill is Bad News for Soldiers and Civilians Alike' (Liberty, 23 September 2020)

<<https://www.libertyhumanrights.org.uk/issue/liberty-the-overseas-operations-bill-is-bad-news-for-soldiers-and-civilians-alike/>> (Last accessed 15 May 2021)

Macdonald K, 'Cover-ups and crime thrive when soldiers who do wrong escape justice' (*The Sunday Times*, 17 November 2019)

<<https://www.thetimes.co.uk/article/cover-ups-and-crime-thrive-when-soldiers-who-do-wrong-escape-justice-hdbbkqd8j>> (Last accessed 15 May 2021)

Malinowski T, 'Assistant Secretary Malinowski: Torture is forbidden in all places, at all times, with no exceptions.' (United States Mission to International Organizations in Geneva' (United States Mission to International Organizations in Geneva, 12 November 2014)

<<https://geneva.usmission.gov/2014/11/12/malinowski-torture-and-degrading-treatment-and-punishment-are-forbidden-in-all-places-at-all-times-with-no-exceptions/>> (Last accessed 15 May 2021)

Mallory C, 'Folk Heroes, Villains and the Overseas Operations Bill' (UK Human Rights Blog, 12 October 2020) <<https://ukhumanrightsblog.com/2020/10/12/folk-heroes-villains-and-the-overseas-operations-bill-conall-mallory/>> (Last accessed 15 May 2021)

Mazzetti M and Shane S, 'Interrogation Memos Detail Harsh Tactics by the C.I.A.' (*New York Times*, 16 April 2009)

<<https://www.nytimes.com/2009/04/17/us/politics/17detain.html>> (Last accessed 15 May 2021)

– – ‘Panel Faults C.I.A. Over Brutality and Deceit in Terrorism Interrogations’
(*New York Times*, 9 December 2014)

<<https://www.nytimes.com/2014/12/10/world/senate-intelligence-committee-cia-torture-report.html>> (Last accessed 15 May 2021)

McCausland J, ‘Trump’s new pardons beg the question: Is the American military just a ‘killing machine’?’ (NBC News, 19 November 2019)

<<https://www.nbcnews.com/think/opinion/trump-s-new-pardons-beg-question-american-military-just-killing-ncna1085651>> (Last accessed 15 May 2021)

McGovern M, ‘The Ivorian Endgame’ (Foreign Affairs, 14 April 2011)

<<https://www.foreignaffairs.com/articles/west-africa/2011-04-14/ivorian-endgame>> (Last accessed 15 May 2021)

Mendez JE and Others, ‘Written evidence from the American University Washington College of Law, Center for Human Rights & Humanitarian Law (OOB0029)’ (Joint Committee on Human Rights, 11 September 2020)

<<https://committees.parliament.uk/writtenevidence/11637/pdf>> (Last accessed 15 May 2021)

Mercer J, ‘Seven years and £30m later: we finally back our frontline troops’ (*The Telegraph*, 11 February 2017)

<<https://www.telegraph.co.uk/news/2017/02/11/seven-years-30m-later-finally-back-frontline-troops/>> (Last accessed 15 May 2021)

– – ‘We must not let our veterans down – the Overseas Operations Bill will stop the endless cycle of investigations’ (*The Telegraph*, 20 September 2020)

<<https://www.telegraph.co.uk/politics/2020/09/20/must-not-let-veterans-the-overseas-operations-bill-will-stop/>> (Last accessed 15 May 2021)

Mercer N, ‘The UK government is attempting to bend the rules on torture’ (*The Guardian*, 20 September 2020)

<<https://www.theguardian.com/commentisfree/2020/sep/20/overseas-operations-bill-uk-government-bend-rules-torture-soldiers>> (Last accessed 15 May 2021)

– – and Fallon M, ‘IHAT to close at the end of June’ (Ministry of Defence, 5 April 2017) <<https://www.gov.uk/government/news/ihat-to-close-at-the-end-of-june>> (Last accessed 15 May 2021)

Ministry of Defence, ‘Ministry of Defence response to allegations relating to the conduct of UK forces in Iraq and Afghanistan’ (Ministry of Defence, 17

November 2019) <<https://www.gov.uk/government/news/ministry-of-defence-response-to-allegations-relating-to-the-conduct-of-uk-forces-in-iraq-and-afghanistan>> (Last accessed 15 May 2021)

– – Mercer J and Wallace B, ‘Armed Forces protected from vexatious claims in important step’ (Ministry of Defence, 18 March 2020)

<<https://www.gov.uk/government/news/armed-forces-protected-from-vexatious-claims-in-important-step>> (Last accessed 15 May 2021)

National Public Radio, ‘Trump Pardons 2 Service Members in War Crimes Cases’ (NPR, 16 November 2019)

<<https://www.npr.org/2019/11/16/780160297/trump-pardons-2-service-members-in-war-crimes-cases?t=1574277421341>> (Last accessed 15 May 2021)

Office of the High Commissioner for Human Rights, ‘Feinstein report: UN expert calls for prosecution of CIA officers and other Government officials’ (Office of the High Commissioner for Human Rights, 9 December 2014)

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15397&LangID=E>> (Last accessed 15 May 2021)

– – “US must stop policy of impunity for the crime of torture”- UN rights expert’ (Office of the High Commissioner for Human Rights, 13 December 2017)

<<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22532&LangID=E>> (Last accessed 15 May 2021)

– – ‘UK Parliament must not introduce impunity for war crimes, say UN experts’ (Office of the High Commissioner for Human Rights, 5 October 2020)

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26342&LangID=E>> (Last accessed 15 May 2021)

– – ‘US pardons for Blackwater guards an “affront to justice” – UN experts’ (Office of the High Commissioner for Human Rights, 30 December 2020)

<<https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26633&LangID=E>> (Last accessed 15 May 2021)

Permanent Mission of France to the United Nations in New York, ‘We remain committed to an international rules-based order’ (Permanent Mission of France to the United Nations in New York, 23 June 2020)

<<https://onu.delegfrance.org/We-remain-committed-to-an-international-rules-based-order>> (Last accessed 15 May 2021)

– – ‘We reiterate our commitment to uphold and defend the principles enshrined in the Rome Statute’ (Permanent Mission of France to the United Nations in New York, 2 November 2020) <<https://onu.delegfrance.org/We-reiterate-our-commitment-to-uphold-and-defend-the-principles-and-values>> (Last accessed 15 May 2021)

Owada H, ‘Statement by H.E. Mr. Hisashi Owada Head of Delegation of Japan to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court’ (Legal Tools, 15 June 1998) <<https://www.legal-tools.org/doc/d38f53/pdf>> (Last accessed 25 July 2021)

Philipps D, ‘Navy SEAL Chief Accused of War Crimes Is Found Not Guilty of Murder’ (*New York Times*, 2 July 2019) <<https://www.nytimes.com/2019/07/02/us/navy-seal-trial-verdict.html>> (Last accessed 15 May 2021)

– – ‘Trump Clears Three Service Members in War Crimes Cases’ (*New York Times*, 15 November 2019) <<https://www.nytimes.com/2019/11/15/us/trump-pardons.html>> (Last accessed 15 May 2021)

Pompeo MR, ‘U.S. Policy on the International Criminal Court Remains Unchanged’ (United States Department of State, 9 October 2019) <<https://2017-2021.state.gov/u-s-policy-on-the-international-criminal-court-remains-unchanged/index.html>> (Last accessed 15 May 2021)

– – ‘ICC Decision on Afghanistan’ (United States Department of State, 5 March 2020) <<https://2017-2021.state.gov/icc-decision-on-afghanistan//index.html>> (Last accessed 15 May 2021)

– – ‘Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court’ (United States Department of State, 2 September 2020) <<https://2017-2021.state.gov/actions-to-protect-u-s-personnel-from-illegitimate-investigation-by-the-international-criminal-court//index.html>> (Last accessed 15 May 2021)

Posner E and Vermeuele A, ‘A ‘Torture’ Memo And Its Tortuous Critics’ (*Wall Street Journal*, 6 July 2004) <<https://www.wsj.com/articles/SB108906730725255526>> (Last accessed 15 May 2021)

– – ‘Why Obama Won’t Prosecute Torturers’ (*Slate*, 9 December 2014) <<https://slate.com/news-and-politics/2014/12/senate-torture-report-why-obama->

wont-prosecute-cia-and-bush-administration-lawbreakers.html> (Last accessed 15 May 2021)

Press Association, 'David Cameron calls for on action in 'spurious claims' against Iraq veterans' (*The Guardian*, 22 January 2016)

<<https://www.theguardian.com/uk-news/2016/jan/22/david-cameron-calls-for-action-on-spurious-claims-against-iraq-veterans>> (Last accessed 15 May 2021)

Public International Law and Policy Group, 'ASP19 Side Event: Launch of the Prosecutor's Report on Preliminary Examination Activities 2020' (PILPG, 15 December 2020)

<<https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/12/15/asp19-side-event-launch-of-the-icc-office-of-the-prosecutors-report-on-preliminary-examination-activities-2020>> (Last accessed 15 May 2021)

Quenivet N, 'Occupational Hazards of Soldiers – A Critique of Section 3 of the Overseas Operations (Service Personnel and Veterans) Bill 2019-21'

(EJIL:Talk!, 17 September 2020) <<https://www.ejiltalk.org/occupational-hazards-of-soldiers-a-critique-of-section-3-of-the-overseas-operations-service-personnel-and-veterans-bill-2019-21/>> (Last accessed 15 May 2021)

REDRESS, 'IHAT closure threatens proper investigations into allegations of torture by the UK' (REDRESS, 10 February 2017)

<<https://redress.org/news/ihat-closure-threatens-proper-investigations-into-allegation-of-torture-by-the-uk/>> (Last accessed 15 May 2021)

– – 'ICC Prosecutor's Decision Not to Investigate UK Abuses in Iraq is a Further Blow for Accountability' (REDRESS, 9 December 2020)

<<https://redress.org/news/icc-prosecutors-decision-not-to-investigate-uk-abuses-in-iraq-is-a-further-blow-for-accountability/>> (Last accessed 15 May 2021)

Ricks TE and Tyson AS, 'Troops at Odds with Ethics Standards' (*Washington Post*, 5 May 2007) <<http://www.washingtonpost.com/wp-dyn/content/article/2007/05/04/AR2007050402151.html>> (Last accessed 15

May 2021)

Robinson P, 'ICC Afghanistan Torture Investigation Likely to Turn on Criminal Intent' (Just Security, 15 April 2020) <<https://www.justsecurity.org/69595/icc->

afghanistan-torture-investigation-likely-to-turn-on-criminal-intent/> (Last accessed 15 May 2021)

Romero AD, 'Pardon Bush and Those Who Tortured' (*New York Times*, 8 December 2014) <<https://www.nytimes.com/2014/12/09/opinion/pardon-bush-and-those-who-tortured.html>> (Last accessed 15 May 2021)

Rona G, 'Can a Pardon Be a War Crime?: When Pardons Themselves Violate the Laws of War' (Just Security, 24 December 2020)

<<https://www.justsecurity.org/64288/can-a-pardon-be-a-war-crime-when-pardons-themselves-violate-the-laws-of-war/>> (Last accessed 15 May 2021)

Roth K, 'The CIA torturers should be prosecuted' (*Washington Post*, 12 December 2014) <[https://www.washingtonpost.com/opinions/the-cia-torturers-should-be-prosecuted/2014/12/12/f034acae-8159-11e4-9f38-](https://www.washingtonpost.com/opinions/the-cia-torturers-should-be-prosecuted/2014/12/12/f034acae-8159-11e4-9f38-95a187e4c1f7_story.html)

95a187e4c1f7_story.html> (Last accessed 15 May 2021)

– – 'Obama's human rights failures could pave the way for Trump's excesses' (*Washington Post*, 9 January 2017)

<<https://www.washingtonpost.com/posteverything/wp/2017/01/09/obamas-human-rights-failures-could-pave-the-way-for-trumps-excesses/>> (Last accessed 15 May 2021)

Sabbagh D, 'Labour calls for halt to bill shielding UK soldiers from prosecution' (*The Guardian*, 25 August 2020)

<<https://www.theguardian.com/law/2020/aug/25/labour-calls-for-halt-of-bill-shielding-uk-soldiers-from-prosecution>> (Last accessed 15 May 2021)

– – 'Rifkind criticises bill to restrict British soldier torture prosecutions' (*The Guardian*, 21 September 2020) <[https://www.theguardian.com/uk-](https://www.theguardian.com/uk-news/2020/sep/21/malcolm-rifkind-criticises-bill-restrict-british-soldiers-tried-torture)

news/2020/sep/21/malcolm-rifkind-criticises-bill-restrict-british-soldiers-tried-torture> (Last accessed 15 May 2021)

Sadat L, 'First They Came for Me and My Colleagues: The U.S. Attack on the Int'l Criminal Court' (Just Security, 29 June 2020)

<<https://www.justsecurity.org/70996/first-they-came-for-me-and-my-colleagues-the-us-attack-on-the-intl-criminal-court/>> (Last accessed 15 May 2021)

Sanchez-Moreno MM, 'Time for Criminal Investigations' (Human Rights Watch, 10 December 2014) <<https://www.hrw.org/news/2014/12/10/time-criminal-investigations>> (Last accessed 15 May 2021)

Schueller A, 'The ICC, British War Crimes in Iraq and a Very British Tradition' (Opinio Juris, 11 December 2020) <<http://opiniojuris.org/2020/12/11/the-icc-british-war-crimes-in-iraq-and-a-very-british-tradition/>> (Last accessed 15 May 2021)

Shackle S, 'Why we may never know if British troops committed war crimes in Iraq' (*The Guardian*, 7 June 2018)

<<https://www.theguardian.com/news/2018/jun/07/british-troops-war-crimes-iraq-historic-allegations-team>> (Last accessed 15 May 2021)

Silverstein K, 'The Charmed Life of a CIA Torturer: How Fate Diverged for Matthew Zirbel, AKA CIA Officer 1, and Gul Rahman' (The Intercept, 14 December 2014) <<https://theintercept.com/2014/12/15/charmed-life-cia-torturer/>> (Last accessed 15 May 2021)

Simons M and Specia M, 'U.S. Revokes Visa of I.C.C. Prosecutor Pursuing War Crimes' (*New York Times*, 5 April 2019)

<<https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html>> (Last accessed 15 May 2021)

Solicitors Regulation Authority, 'Professor Phil Shiner and the Solicitors Disciplinary Tribunal' (Solicitors Regulation Authority, 2 February 2017)

<<https://www.sra.org.uk/sra/news/press/2017/shiner-strike-off-sdt-february-2017/>> (Last accessed 15 May 2021)

Sterio M, 'The ICC Prosecutor's Final Report into the Iraq/UK Investigation: Concerns Over Complementarity and the Court's Future Legitimacy' (IntLawGrrls, 9 December 2020) <<https://ilg2.org/2020/12/09/the-icc-prosecutors-final-report-on-the-afghanistan-uk-investigation-concerns-over-complementarity-and-the-courts-future-legitimacy/>> (Last accessed 15 May 2021)

Stone J, 'Government added 'free pass for torture' to Overseas Operational Bill at last minute, MPs told' (*The Independent*, 28 September 2020)

<<https://www.independent.co.uk/news/uk/politics/government-british-troops-immunity-prosecution-human-rights-b674479.html>> (Last accessed 15 May 2021)

United Nations Treaty Collection, 'Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment' (United Nations Treaty Collection)

<<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf>> (Last accessed 15 May 2021)

United Nations, 'Secretary-General Urges 'Like-Minded' States to Ratify Statute of International Criminal Court' (United Nations, 1 September 1998)

<<https://www.un.org/press/en/1998/19980901.sgsm6686.html>> (Last accessed 25 July 2021)

--, 'Upcoming launch of truth commission hailed by UN as 'step forward' for Tunisia' (United Nations, 6 June 2014)

<<https://news.un.org/en/story/2014/06/470112-upcoming-launch-truth-commission-hailed-un-step-forward-tunisia>> (Last accessed 15 May 2021)

United States Attorney's Office Eastern District of North Carolina 'Government Contract Employee Re-Sentenced for Assault Charge' (United States Department of Justice, 6 April 2010)

<<https://www.justice.gov/archive/usao/nce/press/2010/2010-apr-06.html>> (Last accessed 15 May 2021)

United States Department of Justice Office of Public Affairs, 'Gambian Man Indicted on Torture Charges' (United States Department of Justice, 11 June 2020) <<https://www.justice.gov/opa/pr/gambian-man-indicted-torture-charges>> (Last accessed 15 May 2021)

United States Department of Justice, 'Department of Justice Releases Four Office of Legal Counsel Memos' (United States Department of Justice, 16 April 2009) <<https://www.justice.gov/opa/pr/departments-justice-releases-four-office-legal-counsel-opinions>> (Last accessed 15 May 2021)

-- 'Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees' (United States Department of Justice, 24 August 2009) <<https://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees>> (Last accessed 15 May 2021)

-- 'Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees' (United States Department of Justice, 30 August 2012) <<https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees>> (Last accessed 15 May 2021)

- United States Department of State, 'U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference' (US Department of State, 25 June 2010) <https://2009-2017.state.gov/j/gcj/us_releases/remarks/2010/143178.htm> (Last accessed 15 May 2021)
- – 'Daily Press Briefing – November 15, 2016' (United States Department of State, 15 November 2016) <<https://2009-2017.state.gov/r/pa/prs/dpb/2016/11/264350.htm>> (Last accessed 15 May 2021)
- – 'Daniel Fried' (United States Department of State) <<https://2009-2017.state.gov/r/pa/ei/biog/46525.htm>> (Last accessed 15 May 2021)
- Vedrine H, 'Statement by Mr. Hubert Vedrine, Minister of Foreign Affairs of the French Republic' (Legal Tools, 17 June 1998) <<https://www.legal-tools.org/doc/21cb8a/pdf>> (Last accessed 25 July 2021)
- Verma P, 'Trump's Sanctions on International Court May Do Little Beyond Alienating Allies' (*New York Times*, 18 October 2020) <<https://www.nytimes.com/2020/10/18/world/europe/trump-sanctions-international-criminal-court.html>> (Last accessed 15 May 2021)
- Vladeck S, 'Why We Shouldn't Prosecute the Torturers' (Just Security, 11 December 2014) <<https://www.justsecurity.org/18288/prosecute-torturers/>> (Last accessed 15 May 2021)
- Wako A, 'Statement Delivered by Hon. S. Amos Wako Attorney-General of the Republic of Kenya' (Legal Tools, 16 June 1998) <<https://www.legal-tools.org/doc/417f4a/pdf>> (Last accessed 25 July 2021)
- Wallace S, 'Written evidence from Dr Stuart Wallace (OOB0009)' (Joint Committee on Human Rights, 8 September 2020) <<https://committees.parliament.uk/writtenevidence/11248/pdf>> (Last accessed 15 May 2021)
- Warrell H, 'Former army chiefs attack UK move to limit torture prosecutions' (*Financial Times*, 22 September 2020) <<https://www.ft.com/content/e68a174d-30c7-49af-be40-b6244f1fcbaf>> (Last accessed 15 May 2021)
- White House, 'Statement by the President' (White House, 31 December 2000) <https://clintonwhitehouse4.archives.gov/library/hot_releases/December_31_2000.html> (Last accessed 15 May 2021)

- – ‘Statement of President Barack Obama on Release of OLC Memos’ (White House, 16 April 2009) <<https://obamawhitehouse.archives.gov/the-press-office/statement-president-barack-obama-release-olc-memos>> (Last accessed 15 May 2021)
- – ‘Press Conference by the President’ (White House, 1 August 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/press-conference-president>> (Last accessed 15 May 2021)
- – ‘Statement by the President Report of the Senate Select Committee on Intelligence’ (White House, 9 December 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/12/09/statement-president-report-senate-select-committee-intelligence>> (Last accessed 15 May 2021)
- – ‘Remarks by President Trump to the 73rd Session of the United Nations General Assembly | New York, NY’ (White House, 25 September 2018) <<https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/>> (Last accessed 15 May 2021)
- – ‘Statement from the Press Secretary’ (White House, 15 November 2019) <<https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-97/>> (Last accessed 15 May 2021)
- Whiting A, ‘ICC Prosecutor Signals Important Strategy Shift in New Policy Document’ (Just Security, 17 May 2019) <<https://www.justsecurity.org/64153/icc-prosecutor-signals-important-strategy-shift-in-new-policy-document/>> (Last accessed 15 May 2021)
- Williams AT, ‘Iraq abuse allegations: Resist, deny, hide’ (openDemocracy, 20 November 2016) <<https://www.opendemocracy.net/en/shine-a-light/iraq-abuse-allegations-resist-deny-hide/>> (Last accessed 15 May 2021)
- Zaveri M, ‘Trump Pardons Ex-Army Soldier Convicted of Killing Iraqi Man’ (*New York Times*, 6 May 2019) <<https://www.nytimes.com/2019/05/06/us/trump-pardon-michael-behenna.html>> (Last accessed 15 May 2021)
- Zegart A, ‘SSCI Study of the CIA’s Detention and Interrogation Program: A Flawed Report’ (Lawfare, 10 December 2015) <<https://www.lawfareblog.com/ssci-study-cias-detention-and-interrogation-program-flawed-report>> (Last accessed 15 May 2021)

-- 'A Response to Senator Feinstein' (Lawfare, 21 December 2015)
<<https://www.lawfareblog.com/response-senator-feinstein>> (Last accessed 15
May 2021)