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The Biden Administration Must Defend Americans Targeted by the International Criminal Court

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KEY TAKEAWAYS

Since its founding, the United States has tried to protect its citizens from legal harassment and persecution by foreign courts.

The Prosecutor of the International Criminal Court has compiled a secret annex listing American citizens to be targeted for prosecution for alleged war crimes.

The Biden Administration should stop the ICC from persisting in its misguided prosecution of American citizens that have already been investigated by the U.S.

The Declaration of Independence cataloged the ways in which King George III infringed upon American liberties. Among King George's offenses listed in the Declaration was "Transporting us beyond the Seas to be tried for pretended Offences." The king claimed the authority to seize American colonists and force them to stand trial in Great Britain for criminal offenses allegedly committed in America.

Almost 250 years later, another foreign tribunal—the International Criminal Court (ICC), located in The Hague in the Netherlands—is working toward issuing arrest warrants for American citizens for allegedly abusing detainees in Afghanistan. The court is pursuing this course despite the fact that the United States is not a party to the Rome Statute of the International Criminal Court and therefore not subject to the ICC's jurisdiction.

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Regardless of the fact that the U.S. is a non-party, the ICC Prosecutor (currently Fatou Bensouda from The Gambia) disregarded a central provision of the Rome Statute: the principle of complementarity. That principle prevents the ICC from claiming jurisdiction over a U.S. citizen if the U.S. government has investigated the citizen's alleged crimes, was willing and able to prosecute the citizen, but chose not to do so.

At present, it is unclear whether the Biden Administration will take any effective action to thwart the ICC. It is certainly off to a bad start. On April 2, President Joseph Biden lifted sanctions and visa restrictions imposed by former President Donald Trump on ICC officials involved in the investigation of American citizens.[1] President Biden's action sent a terrible signal to the ICC that the United States is not willing to do everything in its power to deter the prosecution of Americans by an international court.

The Biden Administration should takes steps to ensure that ICC Prosecutor Fatou Bensouda and her successor, Karim Khan of the United Kingdom, go no further in the ICC's misguided investigation of American citizens.

Which Americans Is the ICC Prosecutor Targeting?

The ICC Prosecutor has not publicly released the identities of the U.S. persons that it has identified as possible criminal defendants. However, a "Preliminary list of persons or groups that appear to be the most responsible for the most serious crimes: United States Armed Forces and the Central Intelligence Agency" was included in a confidential addendum (Annex 3C) to its initial Request for Authorization to conduct an investigation.[2] The identities of these U.S. persons remain confidential, but the ICC Prosecutor's Request for Authorization describes the Americans that the Prosecutor is targeting in the following terms:

> Although the US has asserted that it has conducted thousands of investigations into detainee abuse, there is limited information available on the persons or conduct concerned. To the extent discernable, such investigations and/or prosecutions appear to have focussed [*sic*] on alleged acts committed by direct physical perpetrators and/or their immediate superiors. None of the investigations appear to have examined the criminal responsibility of *those who developed, authorized or bore oversight responsibility for the implementation… of the interrogation techniques set out in this Request*.[3]

Thus, it may be inferred that the ICC Prosecutor is not investigating or considering the prosecution of the "direct physical perpetrators"

that conducted the actual interrogations on detainees, such as military interrogators, Central Intelligence Agency (CIA) officers, and contractors. Nor is the Prosecutor's focus on the CIA officials or military officers who were "immediate superiors" of the direct physical perpetrators. Rather, the Prosecutor's focus is directed higher up the chain of authority.

The ICC Prosecutor has not yet publicly identified the Americans higher up in the chain of authority who allegedly "developed, authorized or bore oversight responsibility" for detainee interrogation, but other organizations aligned with the ICC Prosecutor's views on detainee interrogation have done so.

For example, a 2015 Human Rights Watch (HRW) report identified U.S. officials "who played a role in the process of creating, authorizing, and implementing the CIA program."[4] Among those named are President George W. Bush and Vice President Dick Cheney; Cabinet officials (Attorney General John Ashcroft and CIA Director George Tenet); senior White House officials (White House Counsel Alberto Gonzales, National Security Advisor Condoleezza Rice, Counsel to the Vice President David Addington, and National Security Council Legal Advisor John Bellinger); and senior officials from various executive branch departments (Acting CIA General Counsel John Rizzo, Assistant Attorney General for the Office of Legal Counsel Jay Bybee, Deputy Assistant Attorney General John Yoo, and Defense Department General Counsel William Haynes II). Also named are "two CIA psychologist contractors who devised the program, proposed it to the CIA, and helped carry it out."[5]

Similarly, a 2009 criminal complaint was filed in Spain against six Americans in connection with interrogation techniques used at the Guantanamo Bay detention facility. The complaint named Addington, Bybee, Gonzales, Haynes, Yoo, and Under Secretary of Defense for Policy Douglas Feith (collectively dubbed the "Bush Six"). The Spanish National Court ultimately dismissed the case.

Although the ICC Prosecutor has not publicly identified the targets of its investigation, it may be fairly inferred that the Prosecutor is targeting senior U.S. officials who were involved in formulating, approving, or implementing policies relating to detainee interrogation. It is likely that the group includes some of the most senior members of the George W. Bush Administration, including former senior officials from the White House (perhaps including former President Bush himself), the CIA, the Department of Justice (DOJ), and the Department of Defense (DOD).

The Principle of Complementarity

From its inception, the ICC has been a court of limited jurisdiction that would complement rather than supplant the domestic court systems of individual nations. It was designed to investigate and prosecute potential war crimes if and only if the relevant national governments and justice systems were either unwilling or unable to do so themselves. In the words of the ICC's first Prosecutor, Luis Moreno Ocampo:

> [T]he ICC is a *last resort Court* which will only intervene where: 1) there is not or has not been any national investigation or prosecution of the cases; or 2) where there is or has been an investigation or prosecution, but they are vitiated by an unwillingness or inability to genuinely carry out the investigation or prosecution.[6]

This is the principle of complementarity, which "was designed to allow for the prosecution of such crimes at the international level where national systems are not doing what is necessary to avoid impunity and to deter a future commission of crimes."[7]

The principle of complementarity is enshrined in the language of the Rome Statute as a condition precedent to bringing and sustaining a case. Specifically, Article 17 of the Rome Statute states that "the Court shall determine that a case is inadmissible where…[t]he 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."[8]

Putting aside the fact that the United States is not a party to the Rome Statute and does not recognize ICC jurisdiction over any of its citizens, the ICC is barred from bringing a case against U.S. nationals if two conditions are met:

- The U.S. has investigated the allegations against its nationals and has decided not to prosecute them, and

- The U.S. decision not to prosecute its nationals was genuine.

With regard to abuses of detainees in Afghanistan, the record is clear: The U.S. government—the executive and legislative branches as well as the military—thoroughly investigated alleged detainee abuse in Afghanistan. In many cases, criminal charges and military courts-martial were

brought against U.S. personnel who engaged in detainee abuse. In other instances—presumably including the cases that the ICC Prosecutor is investigating—the U.S. decided not to prosecute its nationals.

There is no evidence, and the Prosecutor provides none, that the U.S. government decisions not to prosecute those nationals was disingenuous. Yet the ICC Prosecutor has gone forward with its investigation of those U.S. nationals in contravention of Article 17 of the Rome Statute.

U.S. Government Investigations of Detainee Abuse

The U.S. government's detention, treatment, and interrogation of detainees in Afghanistan (and elsewhere: for example, Iraq and Guantanamo Bay) is one of the most investigated issues in the history of government investigations. For a decade (roughly 2004 to 2014), the U.S. government, including the Department of Justice, Department of Defense, U.S. Congress, and inspectors general of several executive branch departments, conducted numerous investigations into the conduct of U.S. military and civilian personnel relating to allegations of abuse of detainees during interrogation.

CIA Inspector General Investigation. The first significant U.S. government inquiry into allegations of detainee abuse during interrogation was launched by the CIA Inspector General (CIA IG) in January 2003.[9] An investigative team led by the CIA Deputy Inspector General visited overseas interrogation sites, reviewed 38,000 pages of documents, and conducted more than 100 interviews, including interviews with the CIA's senior leadership.[10]

The CIA IG report, *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001–October 2003)*, was completed in May 2004. It described the origins of the Counterterrorist Center Detention and Interrogation Program, including the legal opinions sought by the CIA from the Department of Justice regarding the use of "enhanced interrogation techniques."

The report found, *inter alia*, that "[u]nauthorized, improvised, inhumane, and undocumented detention and interrogation techniques were used" on some occasions by CIA personnel.[11] It also detailed specific instances in which interrogation techniques (such as waterboarding and sleep deprivation) were employed outside the parameters of DOJ legal opinions. Such cases were referred to the DOJ for further investigation and potential prosecution.[12]

The CIA IG report also includes four pages of recommendations, but they remain classified.[13]

Department of Justice Investigations. The Department of Justice spent years investigating the allegations raised in the ICC Prosecutor's Request for Authorization. Among other matters, the DOJ investigated its own legal opinions regarding interrogation techniques, as well as whether CIA personnel acted outside the scope of those legal opinions during detainee interrogations in Afghanistan and elsewhere.

The first DOJ investigation into alleged detainee abuse began more than 15 years ago in October 2004 when the DOJ Office of Professional Responsibility (OPR) initiated a review of legal memoranda written by Jay Bybee, John Yoo, and other officials in the Office of Legal Counsel (OLC).[14] These OLC memoranda provided guidance to both the CIA and the DOD regarding the outer boundaries of detainee interrogation. A July 29, 2009, OPR report criticized Bybee and Yoo for the memoranda and recommended that the DOJ "review certain declinations of prosecution regarding incidents of detainee abuse referred to the [DOJ] by the CIA [Office of Inspector General]."[15]

In August 2009, in the wake of the OPR report and public release of the OLC memoranda,[16] Attorney General Eric Holder directed Assistant U.S. Attorney John Durham to conduct a preliminary review to determine whether federal laws were violated in connection with detainee interrogations at overseas locations.[17] Durham's investigation focused on whether the CIA used any unauthorized interrogation techniques and, if so, "whether such techniques could constitute violations of the torture statute or any other applicable statute."[18]

It is important to note that Durham's mandate was to determine whether the CIA used any "unauthorized" interrogation techniques: The DOJ had previously determined that no U.S. personnel would be criminally prosecuted for using interrogation techniques that the OLC memoranda had approved. As stated by the DOJ:

> [Attorney General] Holder also stressed that intelligence community officials who acted reasonably and relied in good faith on authoritative legal advice from the Justice Department that their conduct was lawful, and conformed their conduct to that advice, would not face federal prosecutions for that conduct.[19]

This meant that if any U.S. personnel interrogated a detainee within the bounds of the OLC opinions, the DOJ would not prosecute them for their actions. As stated by Holder, "It would be unfair to prosecute dedicated men and women working to protect America for conduct that was sanctioned in advance by the Justice Department."[20]

Durham, a career federal prosecutor, "assembled a strong investigative team of experienced professionals" including attorneys and FBI agents to investigate and determine "whether there is sufficient predication for a full investigation into whether the law was violated in connection with the interrogation of certain detainees."[21] In conducting his preliminary review, Durham "examined any possible CIA involvement with the interrogation of 101 detainees" who reportedly were in U.S. custody subsequent to the September 11 terrorist attacks.[22]

In May 2011, Durham submitted his final report regarding his preliminary review.[23] According to Holder, Durham "recommended opening full criminal investigations regarding the death of two individuals while in United States custody at overseas locations, and closing the remaining matters."[24] In other words, Durham recommended that with the exception of the two reported deaths, the Attorney General should decline to prosecute all other allegations relating to alleged detainee interrogation abuses. Attorney General Holder accepted Durham's recommendations.[25]

Military Investigations. At the same time that Durham was investigating the role of CIA personnel in detainee interrogations in Afghanistan, the Department of Defense was conducting multiple inquiries into the detention and interrogation activities of its personnel. These investigations resulted in the prosecution of military personnel through the court-martial system.

In May 2004, Secretary of Defense Donald Rumsfeld launched two major, independent investigations relating to detainees, one relating to the detention of DOD detainees and another relating to DOD interrogation operations.

The Schlesinger Report. On May 12, 2004, Secretary Rumsfeld directed former Secretary of Defense James Schlesinger to investigate "various aspects of allegations of abuse at DoD Detention Facilities." The *Final Report of the Independent Panel to Review DoD Detention Operations* was completed in August 2004. The independent panel concluded that:

> Abuses of varying severity occurred at differing locations under differing circumstances and context. They were widespread and, though inflicted on only a small percentage of those detained, they were serious both in number and in effect. No approved procedures called for or allowed the kinds of abuses that in fact occurred. *There is no evidence of a policy of abuse promulgated by senior officials of military authorities*. Still the abuses were not just the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels.[26]

The Schlesinger report, which built on at least eight previous DOD inquiries, cited approximately 300 incidents of alleged detainee abuse across DOD's operation areas (Iraq, Afghanistan, and Guantanamo Bay). "As of mid-August 2004," according to the report, military authorities had completed 155 investigations into those incidents and had found 66 substantiated incidents of detainee abuse. The report further stated that "[d]ozens of non-judicial punishments have already been awarded" and that "[o]thers are in various stages of the military justice process."[27]

Notably, of the 66 cases, only "about one-third were related to interrogation, and two-thirds [were related] to other causes."[28] Moreover, of the 66 substantiated cases of abuse, only three occurred in Afghanistan.

The Church Report. On May 25, 2004, Secretary Rumsfeld tasked the inspector general of the Navy, Vice Admiral Albert Church, with "conduct[ing] a comprehensive review" of DOD interrogation operations.[29] Church "assembled a team of experienced investigators and subject matter experts in interrogation and detention operations" to conduct the investigation, "which included over 800 interviews with personnel serving or having served in Iraq, Afghanistan and Guantanamo Bay, Cuba, and senior policy makers in Washington, as well as review and analysis of voluminous documentary material."[30]

Admiral Church submitted his *Review of Department of Defense Detention Operations and Detainee Interrogation Techniques* to the Secretary of Defense on March 2005.[31] His report concluded, *inter alia*, that the DOD had not promulgated interrogation policies that directed or encouraged detainee abuse. Moreover, military interrogators "clearly understood that abusive practices and techniques...were at all times prohibited" and that "with limited exceptions (most of which were physical assaults...), interrogators did not employ such techniques, nor did they direct [military police] to do so."[32]

Church's investigation attempted to determine the root causes of detainee abuse during DOD interrogations in Iraq and Afghanistan:

> If approved interrogation policy did not cause detainee abuse, the question remains: what did? While we cannot offer a definitive answer, we studied the DoD investigation reports for all 70 cases of closed, substantiated detainee abuse to see if we could detect any patterns or underlying explanations. Our analysis of these 70 cases showed that they involved abuses perpetrated by a variety of active duty, reserve and national guard personnel from three services on different dates and in different locations throughout Afghanistan and Iraq, as well as a small number of cases at [Guantanamo Bay].[33]

The report concluded that a number of factors contributed to the abuses, including lack of discipline at the point of capture, a failure to react to early warning signs of abuse, and a breakdown of order and discipline at unit-level leadership.[34]

All told, from August 2003 through April 2005, the DOD conducted 13 "senior-level inspections, assessments, reviews, and investigations of detention and interrogation operations" relating to allegations of detainee abuse in Afghanistan and elsewhere.[35] Cumulatively, by February 2006, the DOD had "opened 842 criminal investigations or inquiries into allegations of detainee and prisoner abuse."[36] With specific reference to Afghanistan:

> [M]ore 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.[37]

Congressional Investigations. In addition to the criminal investigations conducted by the DOJ and DOD, as well as internal reviews and independent inquiries made by the Pentagon and CIA, the U.S. Senate conducted two major investigations regarding the detention and interrogation of detainees, including those detained in Afghanistan. One focused on the treatment of detainees in military custody, and the second focused on the CIA's detention and interrogation program.

Senate Committee on Armed Services. In November 2008, the Senate Armed Services Committee (SASC) released a 263-page report, *Inquiry into the Treatment of Detainees in U.S. Custody*.[38] During the course of its inquiry, the SASC interviewed more than 70 individuals and reviewed more than 200,000 pages of documents, "including detention and interrogation policies, memoranda, electronic communications, training manuals, and the results of previous investigations into detainee abuse."[39] The committee also held two public hearings to take testimony during the inquiry.[40]

Senate Select Committee on Intelligence. The Senate Select Committee on Intelligence (SSCI) initiated an inquiry into the CIA's detention and interrogation program in March 2009 and released a report in December 2014. The SSCI report—public release of which was restricted to its executive summary, findings, and recommendations—was more than 700 pages long.[41] The full report totals more than 6,700 pages.[42] In the words of the committee's chairman, Dianne Feinstein (D–CA), the SSCI report

"describes the history of the CIA's Detention and Interrogation Program from its inception to its termination, including a review of each of the 119 known individuals who were held in CIA custody."[43]

Like the SASC inquiry and the investigations conducted by the executive branch, the SSCI inquiry was thorough:

> From early 2009 to late 2012, a small group of Committee staff reviewed the 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....
>
> The breadth of documentary material on which the Study relied and which the Committee Study cites is unprecedented.[44]

According to Chairman Feinstein, the committee's work "produced the most significant and comprehensive oversight report in the Committee's history, and perhaps in that of the U.S. Senate...."[45]

In sum, the U.S. government's investigations into the alleged abuse of detainees during interrogation were historic and unparalleled.

- Every aspect of the Bush Administration's development of enhanced interrogation techniques was explored and dissected.
- Major internal inquiries ordered by former Defense Secretary Rumsfeld resulted in the Schlesinger and Church reports.
- The CIA Inspector General uncovered instances of unauthorized interrogation techniques and referred such cases to the Justice Department for potential prosecution.
- The Justice Department assigned John Durham to conduct a special investigation into any crimes that might have been committed during the interrogation of detainees in Afghanistan and elsewhere.

The ICC Prosecutor, however, deems these efforts inadequate. The Prosecutor has continued to investigate and threaten prosecution for involvement in the very same incidents that already have been investigated so thoroughly by the U.S. government. And in doing so, the Prosecutor is ignoring the central tenet of the Rome Statute: the principle of complementarity.

The ICC Is Ignoring Its Own Complementarity Rules

As noted, the ICC is a "last resort Court" that is constrained by the principle of complementarity "to allow for the prosecution of such crimes at the international level where national systems *are not doing what is necessary to avoid impunity and to deter a future commission of crimes*."[46] The ICC's limited jurisdiction is central to its existence:

> At the heart of [the ICC] system is the idea that, first and foremost, the courts at the national level should deal with cases of serious crimes. The ICC only deals with cases under very limited circumstances. The Rome Statute says in its very first article that the ICC will be *complementary* to national jurisdictions. This is where the word we now frequently use in reference to the Rome Statute system comes from, *complementarity*.[47]

That makes sense. If a nation behaves with impunity, if it is indifferent to crimes committed by its citizens, if its actions do not serve to deter future commission of those crimes, then and only then does the ICC have jurisdiction to investigate and prosecute citizens of that nation.

The United States has not behaved with impunity in regard to allegations that it tortured detainees in Afghanistan. Nor has it been indifferent to the alleged crimes or acted in a way that fails to deter future crimes. Thus, under the terms of the Rome Statute, the United States and its citizens are shielded from ICC prosecution by the principle of complementarity. Under Article 17 of the Statute, the ICC does not have jurisdiction over a case if that "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."[48]

Both elements of Article 17 are satisfied by the U.S. in regard to the ICC's case against the American citizens it deems responsible for alleged detainee abuse in Afghanistan. Specifically:

1. The case being investigated by the ICC Prosecutor "has been investigated" by the United States.

2. The United States "has decided not to prosecute the person[s] concerned," and the U.S. decision not to prosecute was not a result of "the unwillingness or inability of the [United States] genuinely to prosecute."

The ICC case "has been investigated" by the United States. As detailed above, the U.S. government conducted major, years-long inquiries and investigations into the treatment and interrogation of detainees in Afghanistan. The two principal U.S. government agencies responsible for detainee interrogation—the CIA and the Department of Defense—launched independent internal reviews as well as investigations by inspectors general. The Department of Justice reviewed the manner in which its Office of Legal Counsel formulated legal opinions relating to interrogation techniques. In Congress, two Senate committees conducted lengthy and thorough inquiries into military and CIA interrogation practices and released extensive reports on their findings.

Most important, criminal investigations of alleged abuses of detainees were conducted by both civilian and military authorities. On the civilian side, in 2009, the Attorney General directed John Durham to determine whether the CIA's detainee interrogation program involved any violations of law. On the military side, the Defense Department "opened 842 criminal investigations or inquiries into allegations of detainee and prisoner abuse" including alleged abuses of detainees in military custody in Afghanistan.[49]

The ICC Prosecutor is fully aware of the extensive efforts taken by the U.S. government to investigate allegations of detainee abuse in Afghanistan. The fact is that *the bulk of the information in the Prosecutor's Request for Authorization is drawn directly from publicly available reports issued by the CIA, the Defense Department, Congress, and other components of the U.S. government*.

Nevertheless, and despite all of the U.S. government's efforts, the ICC Prosecutor has somehow concluded that "at this stage no national investigations or prosecutions have been conducted...against those who appear most responsible for the crimes allegedly committed by [members of the U.S. armed forces and the CIA]."[50]

The U.S. "has decided not to prosecute" the persons concerned, and this decision was genuine. The U.S. government has decided not to prosecute the American citizens whom the ICC Prosecutor deems "those who developed, authorized or bore oversight responsibility for the implementation" of the U.S. "enhanced interrogation techniques." Putting aside the fact that the U.S. is not even a party to the Rome Statute, under its provisions, the ICC Prosecutor is not permitted to second-guess U.S. prosecutorial declination decisions simply because she disagrees with them. Only if the U.S. decision was not "genuine"—i.e., was made because the U.S. was *unwilling* or *unable* to prosecute—may the ICC Prosecutor challenge and disregard it.

The ICC Prosecutor considers certain indicia of "unwillingness" when determining whether a nation's decision not to prosecute was or was not "genuine." Article 17(2) of the Rome Statute states that the ICC may "determine unwillingness in a particular case" (a) if a nation's decision not to prosecute was "for the purpose of shielding the person" from criminal prosecution; (b) if the nation has unjustifiably delayed proceedings, indicating an intent not to bring its citizen to justice; or (c) the nation's proceedings were not conducted "independently or impartially" or were otherwise conducted in a manner inconsistent with bringing its citizen to justice.[51]

None of those "unwillingness" indicia are present in the U.S. decisions not to prosecute.

- There is no evidence that the U.S. government, acting primarily through the DOJ and DOD, conducted its investigations in a way that was intended to shield any U.S. person from being prosecuted.

- There is no evidence that the U.S. government's investigations were dilatory and that the government had no desire to bring U.S. persons to justice.

- There is no evidence that the multiple investigations into detainee interrogation practices were conducted in a manner that was anything other than independent and impartial.

To the contrary: All of the available evidence indicates that the U.S. government conducted a series of significant, independent investigations into allegations of detainee abuse and subsequently made fully informed decisions regarding whether to prosecute its citizens.

The U.S. Attorney General—the nation's top law enforcement official—made public prosecutorial declination decisions that were known to the ICC Prosecutor. Specifically, Attorney General Holder announced in April 2009 that "intelligence community officials who acted reasonably and relied in good faith on authoritative legal advice from the Justice Department that their conduct was lawful, and conformed their conduct to that advice, *would not face federal prosecutions for that conduct*."[52] Furthermore, in August 2009, Holder directed Durham to open an investigation into whether any members of the intelligence community conducted interrogations that went beyond DOJ legal advice.[53] Ultimately, Durham "examined any possible CIA involvement with the interrogation and detention of 101 detainees" in U.S. custody and ultimately recommended against bringing criminal charges in relation to their treatment.[54]

The Justice Department also investigated the officials who provided legal guidance regarding interrogation practices. Specifically, the OPR reviewed the actions of Jay Bybee, John Yoo, and other OLC attorneys who authored legal memoranda regarding detainee interrogation. The OPR concluded that those officials had committed professional misconduct,[55] but that conclusion was subsequently reversed upon further review by Associate Deputy Attorney General David Margolis.[56] In any event, the Attorney General and the Justice Department were fully aware of the OPR report and the actions taken by Bybee and Yoo but declined to prosecute them.

Non-Criminal Investigations Count for Complementarity

Considering the number of U.S. government investigations into detainee interrogation, it is unclear why the ICC Prosecutor persists in claiming that "no national investigations or prosecutions have been conducted…against those who appear most responsible for the crimes allegedly committed by [members of the U.S. armed forces and the CIA]."[57] That statement is rendered even more confusing by the Prosecutor's statement that she has taken the *non-criminal investigations* (Senate inquiries, inspectors general reviews, etc.) conducted by the U.S. government into account and recognizes them as counting toward complementarity:

> The Prosecution observes that a number of the national inquiries described [in the Request for Authorization] do not appear to have had full investigatory powers or conducted full criminal inquiries. Nonetheless, they generally appear to have been established by the competent prosecutorial or judicial authorities, comprised of law enforcement personnel, and to have had some judicial and investigative powers as well as the authority to identify cases for further criminal investigation. As such, out of an abundance of caution, and to ensure completeness of its analysis, *the Prosecution has considered their findings within the remit of* [the Rome Statute's provisions on complementarity] *as national criminal investigations*, even if on their face these initiatives would appear to fall outside the technical scope of the term.[58]

Even a cursory review of the non-criminal investigations shows that the conduct of the U.S. officials "most responsible" for developing, authorizing, or having oversight responsibility for detainee interrogation has been comprehensively reviewed, investigated, scrutinized, and critiqued. Indeed, it is likely that the vast majority, if not all, of the U.S. officials listed in the ICC Prosecutor's secret Annex 3C have been investigated and even questioned by U.S. government investigators from the DOJ, CIA, DOD, and/or Congress.

It is possible—even probable—that the ICC Prosecutor simply disagrees with the U.S. government's decisions not to prosecute the U.S. officials listed in Annex 3C, but that is not the standard set forth in the Rome Statute. The Prosecutor's opinion about such declination decisions is irrelevant where, as here, the U.S. government's decisions not to prosecute were genuine. The U.S. was willing and able to prosecute CIA, military, and White House officials but chose not to do so after lengthy investigations by the Justice Department, the military, and Congress.

The ICC Prosecutor takes issue with the fact that the Justice Department declined to prosecute CIA personnel who stayed within the bounds of the OLC memoranda when they interrogated detainees. "The conduct of [CIA personnel] who purportedly acted in good faith and within the boundaries of the [OLC] legal guidance," according to the Request for Authorization, "was excluded from scope of possible prosecution from the outset, regardless of the nature and gravity of that conduct."[59]

Elsewhere in the Request for Authorization, the Prosecutor downplays the Durham investigation as a mere "process" conducted by the U.S. government: "Other processes include...a preliminary review...of all allegations relating to CIA detainee abuse, but which excluded in advance from its ambit the prosecution of anyone who acted in good faith within the legal guidance provided by the OLC."[60]

The U.S. does not get credit for the Durham investigation in the Prosecutor's complementarity analysis because the Prosecutor disagrees with the DOJ's declination decision, but—again—that is not the standard. There is no evidence that the Justice Department was capricious or disingenuous in deciding not to investigate or prosecute CIA personnel who acted in accordance with the OLC memoranda. Nor is there evidence that the declination was made to shield CIA personnel from ICC prosecution.

In sum, every aspect of the U.S. detainee interrogation program and its application in Afghanistan has been investigated by the U.S. government. The ICC Prosecutor is of the opinion that the U.S. efforts are insufficient and indicative of a nation acting with impunity. Nothing could be further from the truth, but the ongoing efforts of the Prosecutor, if left unchecked by the Biden Administration, will place multiple former senior U.S. government officials in serious legal jeopardy.

The Biden Administration Must Protect American Citizens

Congress enacted the American Service-Members' Protection Act of 2002 (ASPA) in contemplation of the very actions currently being taken by

the ICC Prosecutor.[61] In its legislative findings, the ASPA notes the central concern of President Bill Clinton's Ambassador-at-Large for War Crimes, David Scheffer, who testified to Congress that:

> Multinational peacekeeping forces operating in a country that has joined the treaty *can be exposed to the Court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty*. Thus, the treaty purports to establish an arrangement whereby United States armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty.[62]

Ambassador Scheffer was prescient. The government of Afghanistan joined the Rome Statute after the United States liberated Afghanistan from the Taliban and while U.S. military forces and intelligence personnel remained on Afghan territory. Those military and intelligence personnel, along with government officials based in Washington, DC, were thereby "exposed" to the ICC's jurisdiction—at least in the eyes of the ICC Prosecutor. It is that exposure that the Biden Administration must address.

Congress foresaw the current situation and authorized the President to take actions to protect and defend American servicemembers and personnel. Specifically, the ASPA authorizes the President to challenge the jurisdiction of the ICC, provide legal representation to U.S. persons accused of crimes, and present exculpatory evidence on behalf of U.S. persons who are being investigated by the ICC.[63]

At this stage, President Biden should intervene on behalf of the American citizens who are most likely to be listed in the ICC Prosecutor's secret Annex 3C: former senior military officers and officials from the Defense Department, the CIA, the Justice Department, and the White House and other U.S. nationals "who developed, authorized or bore oversight responsibility" for the implementation of enhanced interrogation techniques.

At a minimum, the Biden Administration should take the following actions:

- **Challenge the ICC's jurisdiction and admissibility for American citizens.** The American Service-Members' Protection Act authorizes President Biden to challenge the jurisdiction and admissibility of the cases currently being pursued by the ICC Prosecutor. Under the terms of the Rome Statute, a nation that has already "investigated or prosecuted" a case may challenge its admissibility before the ICC under the principle of complementarity.[64]

The President should therefore direct Attorney General Merrick Garland to file an objection with the ICC challenging any case regarding the U.S. citizens listed in Annex 3C. A special emphasis should be placed on the principle of complementarity, but all available jurisdictional defenses should be raised in the objection. The Attorney General should first get the consent of any former U.S. official for whom he intends to object, since there are restrictions on the number of jurisdictional and admissibility challenges that may be made.[65] Finally, the Attorney General should make clear in his objection that the U.S. does not recognize the jurisdiction of the ICC over its citizens and that the U.S. intervention in the case is solely for the purpose of contesting the court's jurisdiction over U.S. citizens.

- **Demand access to annexes that are relevant to the issue of complementarity.** In order for the Attorney General to make a fully informed objection to the admissibility of the case pursuant to Article 19 of the Rome Statute, the ICC Prosecutor must disclose the identities of all American citizens listed in Annex 3C "that appear to be the most responsible for the most serious crimes." The Attorney General should also demand access to Annex 2C, "Indicative list of most serious incidents attributed to members of the United States Armed Forces and the Central Intelligence Agency."[66] Without the identities of the U.S. persons under investigation and a list the incidents in which those persons are allegedly implicated, the Attorney General is handicapped in presenting a comprehensive and fulsome defense regarding the principle of complementarity.

- **Recommit to defending CIA officials and personnel.** In April 2009, Attorney General Holder announced that the U.S. government "would take measures to respond to any proceeding initiated against [any CIA employee] in any international or foreign tribunal, including appointing counsel to act on the employee's behalf and asserting any available immunities and other defenses in the proceeding itself."[67] That commitment was made by a different presidential administration more than a decade ago. It should be reaffirmed by President Biden and Attorney General Garland.

- **Commit to defending Defense Department personnel targeted by the ICC.** The ICC Prosecutor's Request for Authorization makes clear that the ICC is investigating former DOD officials and personnel with a view to possible prosecution. President Biden, Secretary of

Defense Lloyd Austin, and Attorney General Garland should provide counsel and assert immunities and defenses for any former DOD officials or military officers that might be listed in Annex 3C.

- **Commit to defending any other U.S. official or personnel targeted by the ICC.** The ICC Prosecutor has a secret list of American citizens (Annex 3C) it is investigating in connection with the treatment and interrogation of detainees in Afghanistan. Some Americans who may be on that list are neither CIA nor Defense Department officials. Annex 3C could include former officials from the Justice Department and the White House, as well as other U.S. nationals "who developed, authorized or bore oversight responsibility" for the implementation of enhanced interrogation techniques. The Biden Administration should provide counsel and protect the interests of any such official in any ICC proceeding.

- **Publicly release information relating to the issue of complementarity.** At a minimum, short of directly representing the U.S. persons most likely to be listed in Annex 3C, the Biden Administration could release information that would bolster the defenses of those persons. It is unclear what additional information the ICC Prosecutor believes is needed to make an informed decision regarding complementarity. In her Request for Authorization, the Prosecutor states that she "sought from the US authorities, but did not receive, specific information on national proceedings that it could rely on."[68]

  However, in the U.S. legal system, information gathered as part of a criminal investigation is generally not released publicly—especially when the investigation does not result in prosecution. In the military system, the identities of personnel who have undergone court-martial proceedings or been investigated for such proceedings are not usually made public. This naturally makes it difficult to establish definitively whether a particular U.S. national has been investigated by the U.S. government. With the consent of any concerned former U.S. official or military officer, the Biden Administration should make public relevant information to establish that the U.S. government investigated and declined prosecution of the officials likely targeted by the ICC Prosecutor in Annex 3C. Alternatively, the Biden Administration could release a statement disclosing information necessary to establish that the ICC is violating its own rules regarding complementarity.

Conclusion

There are many other steps that the Biden Administration should take relating to the ICC if the Prosecutor persists in pursuing its case against American citizens, including reiterating the U.S. intention to remain a non-party to the Rome Statute, ending all cooperation with the ICC in other cases unrelated to the United States, and other actions.[69] Taking those steps and implementing the foregoing recommendations is the minimum that the Biden Administration can do to protect American sovereignty and protect U.S. citizens from legal harassment and persecution by a foreign court.

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Endnotes

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