# WHAT COUNTS AS "STATE ACTION" UNDER ARTICLE 17 OF THE ROME STATUTE? APPLYING THE ICC'S COMPLEMENTARITY TEST TO NON-CRIMINAL INVESTIGATIONS BY THE UNITED STATES INTO WAR CRIMES IN AFGHANISTAN

#### KAVERI VAID\*

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<sup>\*</sup> J.D. Candidate, New York University School of Law, 2012; LL.M. Candidate in International Law, New York University School of Law, 2013. I am extremely grateful to José Alvarez for his extensive guidance and patient and generous feedback. I am also grateful to Valerie Brender, Darren Geist, Polina Levina, Stephanie Morris, Natassia Rozario, Lisa Sweat, and Ilze Tralmaka for their insightful and critical feedback. Finally, I am indebted to the editors at the New York University School of Law Journal of International Law and Politics for their meticulous editing. All errors are solely my own.

#### I. Introduction

The International Criminal Court<sup>1</sup> (the Court) is explicitly a court of last resort.<sup>2</sup> Bound by the principle of complementarity, it can only act in the absence of genuine domestic proceedings.<sup>3</sup> The Court has given content to the precise boundaries of the complementarity provisions contained in article 17 of the Rome Statute<sup>4</sup> as it evaluates new situations and cases.<sup>5</sup> Perhaps incongruously with the Court's last-resort status, these interpretations of the complementarity requirements have set a fairly high bar for domestic proceedings to

<sup>1.</sup> The International Criminal Court is currently empowered to investigate and prosecute instances of genocide, crimes against humanity, and war crimes. It has jurisdiction over these crimes if either the alleged perpetrator is a national of a state party to the Rome Statute, or if the alleged crimes occurred on the territory of a state party. The Court can initiate an investigation in one of three ways: the state party can self-refer its own situation to the Court; the Security Council can refer a situation under Chapter VII; or the Prosecutor can initiate an investigation into a situation *proprio motu*. In all cases, the Office of the Prosecutor (OTP) first investigates the entire situation—encompassing all alleged crimes and perpetrators—and subsequently builds individual cases against individual defendants. If the Prosecutor initiates an investigation *proprio motu*, he must obtain authorization from the Pre-Trial Chamber.

<sup>2.</sup> Rome Statute of the International Criminal Court pmbl., art. 17, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>3. &</sup>quot;Genuine" is a term of art, and its contours will be explored later in this paper.

<sup>4.</sup> Article 17 of the Rome Statute specifies the admissibility requirements of a case or situation. In addition to the complementarity requirements, article 17 also imposes a gravity requirement for the alleged crimes. The complementarity provisions of article 17 prevent the Court from acting in the face of existing domestic investigations or prosecutions. A case or situation becomes inadmissible on complementarity grounds if the state with jurisdiction is presently investigating or prosecuting the relevant conduct and perpetrators at issue under article 17(1)(a), or if the state with jurisdiction has already investigated and decided not to prosecute under article 17(1)(b). Rome Statute, *supra* note 2.

<sup>5.</sup> A "situation," a term of art in ICC jurisprudence, can encompass all crimes and perpetrators in a given territory within a given timeframe. Because, at the situation stage, individual cases have not yet been defined, assessing the admissibility of a situation requires an examination of the set of cases likely to come before the Court. See Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 50 (Mar. 31, 2010), http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf [hereinafter Kenya Authorization Decision].

meet. Despite the absence of limiting language regarding types or characteristics of domestic proceedings in the text of article 17, the Court's complementarity jurisprudence has made clear that not all domestic proceedings constitute state action sufficient to render a case or situation inadmissible.<sup>6</sup>

For a case or situation to be admissible under the complementarity requirements of article 17,7 the Court must determine that no state with jurisdiction has taken genuine and concrete action with respect to the case or set of cases likely to come before the Court.8 Based on the plain text of the complementarity provisions of article 17, this action must begin with a domestic investigation before the state either prosecutes or decides not to prosecute a particular case.9 At this point, the Court has not yet decided whether an investigation conducted outside of a state's criminal justice system could satisfy the requirement of article 17.

The need to define the term "investigation" as it appears in article 17 more precisely exposes a fundamental tension between the Court's complementary status to national jurisdictions and the Court's purpose to fill the impunity gap for international crimes.<sup>10</sup> The complementarity requirement en-

<sup>6.</sup> The Court has defined "state action" as a term of art, requiring more than simply an objective showing of any investigative and/or prosecutorial steps taken by the state. *See, e.g., id.* ¶ 42. For a deeper discussion of the term "state action," see *infra* text accompanying notes 149–161.

<sup>7.</sup> Article 17 of the Rome Statute states that the admissibility inquiry encompasses both complementarity (requiring that the Court act only in the face of domestic inaction or unwillingness or incapacity to act) and gravity. Rome Statute, *supra* note 2, art. 17(1). This note will only evaluate the complementarity inquiry; however, for any case or situation to be admissible the gravity requirement must also be satisfied.

<sup>8.</sup> *Id.* art. 17(1)(a)–(b); Kenya Authorization Decision, *supra* note 5,  $\P\P$  42–43.

<sup>9.</sup> Article 17(1)(a) states that a case will be inadmissible if "[t]he 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." Rome Statute, *supra* note 2. Article 17(1)(b) states that a case will be inadmissible if "[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." *Id.* Both alternatives first require a domestic investigation.

<sup>10.</sup> See Michael Newton, The Complementarity Conundrum, 8 Santa Clara J. Int'l L. 115, 121 (2010) ("[T]he Rome Statute stands for the proposition

sures that a state with jurisdiction can assert primacy over a particular case, even if that case would otherwise be admissible before the Court. This statutory grant of domestic primacy gives maximum protection to a state's ability to exercise its own jurisdiction over international crimes.<sup>11</sup> Giving this protection full force would seem to require that the Court should defer to a broad range of domestic proceedings under article 17 as long as they are genuine.<sup>12</sup> However, the Court was established as an explicitly criminal justice backstop for international crimes,<sup>13</sup> suggesting an assumption by the drafters that some type of criminal justice mechanism was required with respect to the particular crimes prohibited by the Rome Statute. Such an assumption in turn argues for a narrower reading of article 17 that requires deference only to domestic criminal justice investigations and actions.

Under article 17, a state with jurisdiction can investigate and prosecute,<sup>14</sup> or investigate and then decide not to prosecute.<sup>15</sup> Either sequence of actions, as long as it is found to be genuine, makes the case in question inadmissible before the

that accountability for the array of crimes of most serious concern to the international community as a whole cannot be achieved without impinging upon the traditional criminal jurisdiction of states."); Héctor Olásolo, *The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?*, 3 Int'l Crim. L. Rev. 87, 97 (2003) ("[T]he R[ome] S[tatute] not only allows the ICC to exercise its jurisdiction when national Courts are not doing their job properly, i.e. to investigate and prosecute 'the most serious crimes of concern to the international community as a whole,' but it also empowers the ICC to *decide* whether national Courts are doing their job properly.").

<sup>11.</sup> The Preamble of the Rome Statute emphasizes that the Court shall be complementary to domestic jurisdictions, ensuring that the state with jurisdiction is guaranteed primacy in exercising that jurisdiction. Rome Statute, *supra* note 2. *See also* Sharon A. Williams & William A. Schabas, *Article 17 Issues of Admissibility, in* Commentary on the Rome Statute of the International Criminal Court 605, 610 (Otto Triffterer ed., 2008) (explaining the negotiating history of the "inability" and "unwillingness" language).

<sup>12.</sup> The issue of genuineness is a critical component of the complementarity inquiry. This note will discuss interpretations and indicators of genuineness at *infra* text accompanying notes 181–211. The mention of genuineness here is merely to indicate that article 17 requires the domestic proceedings to be genuine and not to be manifestations of unwillingness or inability to genuinely investigate or prosecute.

<sup>13.</sup> Rome Statute, *supra* note 2, pmbl., art. 1.

<sup>14.</sup> Id. art. 17(1)(a).

<sup>15.</sup> *Id.* art. 17(1)(b).

Court. The focus of this note will be on article 17(1)(b), which finds a case or situation inadmissible before the Court if a state with jurisdiction has investigated and then decided not to prosecute, unless the investigation or the decision not to prosecute was not genuine. As the text of article 17(1)(b) makes clear, the question of whether a state has investigated and decided not to prosecute is distinct from the question of whether the Court must defer to that decision. The former is a question of fact—asking whether the state has undertaken the requisite procedures and made the requisite final decision. The latter turns on the analysis of whether that decision was genuinely made.

The Rome Statute does not define the term "genuinely." The language of article 17(1)(b) suggests that genuineness should be interpreted as the converse of unwillingness or inability, stating that a case will be inadmissible before the Court following a domestic investigation and subsequent decision not to prosecute "unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute." If indicators of unwillingness or inability are present in a particular case, therefore, then the state's decision not to prosecute cannot be genuine and thus should not mandate deference from the Court.

The investigative responses by the United States to allegations of authorized detainee abuse in Afghanistan pose new challenges to the boundaries of article 17(1)(b).<sup>19</sup> Currently,<sup>20</sup> the Office of the Prosecutor (OTP) is examining<sup>21</sup> Af-

<sup>16.</sup> Id.

<sup>17.</sup> See Kenya Authorization Decision, supra note 5, ¶ 53 (citing Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 78 (Sept. 25, 2010), http://www.icc-cpi.int/iccdocs/doc/doc/46819.pdf).

<sup>18.</sup> Rome Statute, *supra* note 2, art. 17(1) (b).

<sup>19.</sup> As the Pre-Trial Chamber clarified in its decision authorizing an investigation into the situation in Kenya, while article 17 of the Rome Statute explicitly refers to "cases," article 53 requires the same analysis to be applied to situations when evaluating the admissibility of that situation. Kenya Authorization Decision, *supra* note 5,  $\P$  45–50.

<sup>20.</sup> At the point of this writing, in January 2012.

<sup>21.</sup> The situation in Afghanistan is currently under preliminary examination by the OTP. *Afghanistan*, Int'l Criminal Court, http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/

ghanistan preliminarily as a situation.<sup>22</sup> At the situation stage, evidence about specific cases and alleged perpetrators generally tends to be preliminary, incomplete, and speculative.<sup>23</sup> Therefore, all crimes committed in Afghanistan since May 1, 2003 may potentially fall within the scope of the Court's investigations.<sup>24</sup> Before any individual cases can be selected, the OTP must first initiate a formal investigation<sup>25</sup> into the situation in Afghanistan as a whole.<sup>26</sup>

Comm+and+Ref/Afghanistan (last visited Nov. 4, 2011). A preliminary examination is an evaluative stage preceding a formal investigation. The OTP can place a situation over which the Court has jurisdiction under preliminary examination without review by the Pre-Trial Chamber. However, the OTP must obtain approval of the Pre-Trial Chamber (a panel of judges selected to hear motions and make requisite decisions before a trial begins) before initiating a formal investigation into the situation under the *proprio motu* powers of article 15. Rome Statute, *supra* note 2.

- 22. The situation in Afghanistan would encompass all crimes under the jurisdiction of the Court committed by perpetrators on all sides—whether Taliban forces, Afghan forces, or U.S. armed forces.
- 23. Rod Rastan, What Is a 'Case' for the Purpose of the Rome Statute, 19 CRIM. L.F. 435, 441 (2008) (noting that "before the Prosecution has opened an investigation, it does not know with any certainty what evidence it will gather, against which persons, and for what conduct"); Héctor Olásolo & Enrique Carnero Rojo, The Application of the Principle of Complementarity to the Decision of Where to Open an Investigation: The Admissibility of 'Situations,' in The International Criminal Court and Complementarity: From Theory to Practice (Carsten Stahn & Mohamed El Zeidy eds., 2011) (forthcoming 2011) ("At this stage, the Prosecution does not know with certainty what evidence it will gather, against which persons, and for what conduct—and that, as shown by the DRC and Darfur investigations, cases only arise at a much later stage of proceedings—the object of article 53(1)(b) and Rule 48 admissibility assessments can only be situations.").
- 24. Afghanistan acceded to the Rome Statute on February 10, 2003. Article 126 provides that the statute will enter into force for a particular state on the first day of the month after the 60th day following a state's accession. Rome Statute, *supra* note 2, art. 126(2). Thus, the Rome Statute entered into force in Afghanistan on May 1, 2003. The Court only has jurisdiction over crimes committed in Afghanistan after that date. *Id.* art. 11(2) ("If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.").
  - 25. See supra note 1.
- 26. An investigation by the OTP into the situation in Afghanistan reaches all parties to the conflict who allegedly committed crimes under the jurisdiction of the Court. It is undisputed that Afghan nationals—Taliban and affiliated insurgents—committed significant crimes involving large numbers of

victims in Afghanistan. For a sampling of reports detailing these crimes, see the following sources: Human Rights Report: Afghanistan, U.S. State Depart-MENT, http://www.state.gov/g/drl/rls/hrrpt/index.htm (last visited Nov. 4, 2011) (published annually); Afg. Indep. Human Rights Comm'n, Insurgent Abuses Against Afghan Civilians (2008), available at http://www.aihrc. org.af/2010\_eng/Eng\_pages/Reports/Thematic/Eng\_anti\_G.pdf. crimes and alleged perpetrators would clearly be of interest to the Court if a formal investigation into Afghanistan occurred. An analysis of the overall situation in Afghanistan against relevant Rome Statute provisions would undoubtedly be incomplete without addressing these crimes in detail. However, the issue of the precise nature of domestic processes that qualify as investigations for the purposes of article 17's complementarity requirement is not as relevant with regard to the investigation and prosecution of Taliban crimes, simply because the types of administrative, non-sanctioning proceedings to be evaluated by this article have not occurred with respect to Afghan nationals. Much has already been written about the specific conduct at issue (on the U.S. side, abuse of detainees; on the Taliban side, campaigns of killing, intimidation, and persecution based on gender, among other crimes). For a sampling, see, for example, the following: CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, HUMAN RIGHTS WATCH, & HUMAN RIGHTS FIRST, BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND AC-COUNTABILITY PROJECT (2006), available at http://www.humanrightsfirst.org/ wp-content/uploads/pdf/06425-etn-by-the-numbers.pdf; Int'l Comm. of THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN "HIGH VALUE DETAINEES" IN CIA CUSTODY 12 (2007) [hereinafter ICRC REPORT], available at http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf; Malcolm Fraser, Torture Team: A Response to Phillippe Sands, 9 Melb. J. Int'l L. 381 (2008); Geert-Jan Alexander Knoops, International Criminal Law Liability for Interrogation Methods by Military Personnel Under Customary International Law and the ICC Statute, 4 INT'L CRIM. L. REV. 211 (2004); Phillippe Sands, Torture Team: The Responsibility of Lawyers for Abusive Interrogation, 9 Melb. J. Int'l L. 365 (2008); Matthew C. Waxman, The Law of Armed Conflict and Detention Operations in Afghanistan, 85 Int'l L. Stud. Series U.S. Naval War C. 353 (2009). For specific reports, see the State Department's Human Rights Reports for Afghanistan from 2006, 2007, 2008, and 2009, Human Rights Report: Afghanistan, supra, and Afg. Indep. Human Rights Comm'n, supra. Much has also been written about the gravity threshold required for the Court to act and the general interplay between quantitative and qualitative factors. These issues will be highly relevant to the OTP as it determines whether or not to initiate a formal investigation into Afghanistan. However, this paper will not rehash those arguments. Nor will it delve into the significant policy challenges that would arise were the Court to initiate a formal investigation of conduct by U.S. nationals, as those challenges will only become relevant (rather than abstract conjecture) once the case for an investigation into Afghanistan is legally established. Rather, this paper will focus solely on the specific question of the compatibility of non-criminal investigations with article 17.

To date, the United States has taken a range of investigative actions in response to alleged Rome Statute crimes committed by U.S. nationals in Afghanistan: court-martials for lower-level direct perpetrators; congressional hearings for more senior officials; agency Inspector General reports; and the Department of Justice Office of Professional Responsibility inquiry into the advice proffered by former Office of Legal Counsel lawyers on the legality of "enhanced interrogation techniques" used on detainees held in Afghanistan, Iraq, and at Guantanamo Bay prison. All of these proceedings occurred entirely outside of the American criminal justice system. Following these proceedings, the Obama Administration, through many public statements and actions, clearly communicated its decision not to prosecute the development and implementation of "enhanced interrogation techniques" on detainees in Afghanistan and at other sites. Under article 17(1)(b), the United States can thus make a credible argument that it decided not to prosecute the alleged perpetrators of torture in Afghanistan following inquiries into their responsibility for the crimes. However, this decision alone does not automatically preclude Court action. Rather, as this note will argue, the selection of entirely non-criminal investigative proceedings followed by the decisions not to prosecute any highlevel perpetrators in fact indicate unwillingness by the United States to genuinely take action. As a consequence, the Court remains free to initiate a formal investigation into the situation in Afghanistan.

When evaluating a complementarity challenge in the situation context, the domestic proceedings in question must reach the set of potential cases likely to come before the Court.<sup>27</sup> This note will first define the set of potential cases involving crimes committed in Afghanistan by U.S. nationals. Then, this note will evaluate whether any of the proceedings undertaken by the United States qualify as "investigations" of those potential cases under the terms of article 17. Two general questions are relevant to this inquiry. First, this note will analyze whether domestic non-criminal investigations can satisfy the requirements of article 17 at all. Second, this note will evaluate whether, even if non-criminal mechanisms may generally satisfy the requirements of article 17, the specific proceed-

<sup>27.</sup> Kenya Authorization Decision, *supra* note 5, ¶ 50.

ings undertaken by the United States remain deficient because of their limited scope.<sup>28</sup> Finally, this note will evaluate whether the actions taken by the United States in response to alleged crimes in Afghanistan can and should bar the Court from opening an investigation into Afghanistan on complementarity grounds. This note will analyze the totality of the proceedings—both the non-criminal investigations and the subsequent decisions not to prosecute any alleged offenders—against the standard of genuineness, evaluating whether these actions actually indicate unwillingness by the United States to genuinely investigate and prosecute.

# II. SITUATIONAL COMPLEMENTARITY: POTENTIAL CASES AND DOMESTIC RESPONSES

While the text of article 17 refers to cases, the Court has affirmed that it also applies to the admissibility of situations.<sup>29</sup> At the situation stage, individual cases or perpetrators are merely speculative.<sup>30</sup> Rather than focusing on individual cases, therefore, the inquiry into situational complementarity looks not to a particular case but instead to the *set of potential cases* that are likely to come before the Court.<sup>31</sup>

As established by the Pre-Trial Chamber, the set of potential cases has two components: "the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping future cases; and the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation."<sup>32</sup> This note will first define the set of potential cases involving U.S. nation-

<sup>28.</sup> In its decision authorizing an investigation into the situation in Kenya, the Pre-Trial Chamber found that proceedings clearly constituting domestic investigations and prosecutions (criminal prosecutions) were still insufficient to qualify as state action under article 17 because these proceedings did not reach high-level perpetrators. *Id.* ¶ 185.

<sup>29.</sup> *Id.* ¶ 42 ("The first occasion where an admissibility determination must be carried out emerges in response to a referral by either a state party or the Security Council or when the Prosecutor is acting *proprio motu*. In these instances, the Prosecutor must conduct an initial admissibility examination . . . ." (citations omitted)).

<sup>30.</sup> Id. ¶ 44.

<sup>31.</sup> *Id.* ¶ 50.

<sup>32.</sup> Id. ¶ 50.

als,<sup>33</sup> detailing the acts prohibited by the Rome Statute and the involvement of senior perpetrators responsible for the commission of such acts. Then, this note will evaluate the nature and scope of the United States' responses,<sup>34</sup> evaluating whether these proceedings can preclude parallel Court action.<sup>35</sup>

## A. Crimes Within the Jurisdiction of the Court

The Court is not required to prosecute every admissible case that falls within its jurisdiction. Therefore, defining the set of potential cases likely to come before the Court requires first analyzing guidelines the Court is likely to follow in case selection.<sup>36</sup> As a baseline, the conduct in question must be

<sup>33.</sup> Here, a brief statement of clarification of the scope of this note is necessary. Many significant crimes within the Court's jurisdiction have been committed in Afghanistan since May 1, 2003. Numerous crimes perpetrated by the Taliban and affiliated individuals would likely constitute crimes against humanity, war crimes, or both under the Rome Statute. These crimes would almost certainly be included in the set of potential cases likely to come before the Court. However, the narrow focus of this note is whether non-criminal investigations followed by decisions not to prosecute fall within the scope of protected activities under article 17(1)(b). As such, the many crimes perpetrated by the Taliban are not relevant to the question of this note. Rome Statute, *supra* note 2, art. 17(1)(b).

<sup>34.</sup> Kenya Authorization Decision, *supra* note 5, ¶ 52 (defining the relevant inquiry as "whether the relevant State(s) is/are conducting or has/have conducted national proceedings in relation to the groups of persons and crimes allegedly committed during those incidents, which together would likely form the objects of the Court's investigations").

<sup>35.</sup> See id. Here, an additional unresolved question arises. That question is whether, in the context of a situation involving two different sets of perpetrators, investigations of only one set of perpetrators could make the entire situation preemptively inadmissible—specifically, for example, if only the United States is found to have investigated alleged crimes committed by its nationals, whether the Court would be barred on complementarity grounds from initiating a formal investigation into the entire situation in Afghanistan. Extrapolating from the Court's existing jurisprudence on complementarity and its strong preference for bringing alleged perpetrators before some type of justice mechanism, a more plausible interpretation instead seems to be that the situation as a whole would remain admissible as long as a sufficient set of potential cases involving persons most responsible remains uninvestigated, with subsequent cases against already investigated perpetrators remaining inadmissible. However, the Court has not yet ruled on this question.

<sup>36.</sup> The OTP has discretion to select from among those crimes particular cases to bring forward. Therefore, analysis of the set of potential cases that

prohibited by a provision of articles 5, 6, 7, or 8 of the Rome Statute.<sup>37</sup> Beyond that, relevant provisions of the Rome Statute, combined with general OTP policies and practices and relevant Chambers<sup>38</sup> holdings, guide the OTP's case selection priorities. Article 1 specifies that the Court's focus centers on "the most serious crimes of concern to the international community."<sup>39</sup> More directly, article 17 requires that a case must be "of sufficient gravity" to be admissible before the Court.<sup>40</sup> The Chambers and the OTP have repeatedly agreed that the Court must focus its efforts on the investigation and prosecution of "persons most responsible," even if those persons are not the direct perpetrators of the crimes in question.<sup>41</sup> In-

form the basis of the situational complementarity analysis must first determine which cases would in fact likely be selected by the OTP.

<sup>37.</sup> Article 5 of the Rome Statute prohibits genocide, crimes against humanity, and war crimes. Rome Statute, *supra* note 2, art. 5. Articles 6–8 provide further detail, listing specific prohibited acts within each general category of crime. *Id.* art. 6–8.

<sup>38.</sup> The Court's Chambers, or panels of judges, includes Pre-Trial, Trial, and Appellate levels. *Id.* art. 34(b).

<sup>39.</sup> Id. art. 1.

<sup>40.</sup> *Id.* art. 17(1)(d). For a general (but not specific to Afghanistan) evaluation of the Rome Statute's gravity requirement, see, for example, Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Judgment on the Prosecutor's Appeal Against the Decision of the Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (July 13, 2006), http://www.icc-cpi.int/iccdocs/doc/doc183559. pdf; War Crimes Research Office, Am. Univ. Wash. Coll. of Law, The Gravity Threshold of the International Criminal Court (2008); Margaret M. deGuzman, Gravity and the Legitimacy of the International Criminal Court, 32 FORDHAM INT'L L.J. 1400 (2009); Kevin Jon Heller, Situational Gravity Under the Rome Statute, in Future Directions in International Criminal JUSTICE (Carsten Stahn & Larisa Van Den Herik eds., 2009); Susana SáCouto and Katherine Cleary, The Gravity Threshold of the International Criminal Court, 23 Am. U. Int'l L. Rev. 807 (2008); Ignaz Stegmiller, The Gravity Threshold Under the ICC Statute: Gravity Back and Forth in Lubanga and Ntaganda, 9 INT'L CRIM. L. REV. 547 (2009); Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Statement at Informal Meeting of Legal Advisors of Ministries of Foreign Affairs (Oct. 24, 2005), available at http://www.icccpi.int/iccdocs/asp\_docs/library/organs/otp/speeches/LMO\_20051024\_ English.pdf; Mark Osiel, How Should the ICC Office of the Prosecutor Choose its Cases? The Multiple Meanings of 'Situational Gravity,' THE HAGUE JUSTICE POR-TAL (Mar. 5, 2009), http://www.haguejusticeportal.net/eCache/DEF/10/ 344.html.

<sup>41.</sup> Due to the particular nature of Rome Statute crimes, the persons most responsible will often not be the direct perpetrators of individual crimi-

deed, persons most responsible for the categories of crimes prohibited by the Rome Statute often will not be the direct perpetrators, but instead those who "ordered, financed, or organized" the commission of those crimes.<sup>42</sup>

Alleged crimes committed by U.S. nationals in Afghanistan involve torture and mistreatment of detainees captured during the armed conflict in Afghanistan and held and interrogated in U.S. custody. Article 8 of the Rome Statute gives the Court jurisdiction over war crimes committed in either an international or non-international armed conflict.<sup>43</sup> Moreover, article 8 specifically prohibits torture and cruel treatment<sup>44</sup> and inhuman and degrading treatment<sup>45</sup> in all types of armed conflicts. Within the situation in Afghanistan, acts violating article 8 fall into two categories: those sanctioned as official policy by the Bush Administration (referred to by former Administration officials as "enhanced interrogation techniques");<sup>46</sup> and those exceeding even the officially approved boundaries of those "enhanced interrogation techniques."

nal acts. *See*, *e.g.*, Office of the Prosecutor, Int'l Criminal Court, Prosecutorial Strategy 2009–2012, ¶ 14 (2010) [hereinafter Prosecutorial Strategy 2009–2012] ("[T]he Office of the Prosecutor will select for prosecution those situated at the highest echelons of responsibility, including those who ordered, financed, or organized the alleged crimes.").

<sup>42.</sup> Id.

<sup>43.</sup> Rome Statute, *supra* note 2, art. 8(2)(a)-(d). All alleged crimes committed by U.S. nationals discussed here were committed in the context of the armed conflict in Afghanistan. Because the conduct in question is prohibited both in international and non-international armed conflicts, this note will not delve into the specific character of the conflict in Afghanistan at the time the alleged crimes were committed.

<sup>44.</sup> For international armed conflicts, see id. art. 8(2)(a)(ii) (torture or inhuman treatment). For non-international armed conflicts, see id. art. 8(2)(c)(i) (violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture).

<sup>45.</sup> For international armed conflicts, see id. art. 8(2)(a) (iii) (willfully causing great suffering, or serious injury to body or health). For non-international armed conflicts, see id. art. 8(2)(c) (ii) (committing outrages upon personal dignity, in particular humiliating and degrading treatment).

<sup>46.</sup> Julie B. Martin, *The International Criminal Court: Defining Complementarity and Divining Implications for the United States*, 4 Loy. U. Chi. Int'l L. Rev. 107, 120 (2006) ("The Rome Statute's definition of torture as a war crime encompasses a broader scope of maltreatment than does the Bush administration's extremely narrow definition.").

In February 2002, former President George W. Bush decided<sup>47</sup> that the United States would no longer grant members of al Qaeda captured in Afghanistan the protections that had been traditionally guaranteed to detainees and prisoners by the Geneva Conventions (including Common Article 3).48 While the Bush Administration maintained that Geneva Conventions protections generally applied to captured members of the Taliban, former President Bush declared that Taliban detainees would not be considered Prisoners of War (POWs) and thus not be granted the more robust protections given POWs.<sup>49</sup> Despite assurances that all detainees would still be treated "humanely," 50 senior Bush Administration officials began a concerted effort to implement so-called "enhanced interrogation techniques" against detainees captured in the "war on terror." While these techniques were initially approved for use at Guantanamo Bay, they quickly "migrated to Afghanistan

<sup>47.</sup> Press Release, White House Office of the Press Sec'y, Statement by the Press Secretary on the Geneva Convention (Feb. 7, 2002), available at http://www.state.gov/s/1/38727.htm.

<sup>48.</sup> Common Article 3, appearing in all four Geneva Conventions, applies in all cases of armed conflict not of an international character and provides a minimum baseline of required protections for all persons who have been made *hors de combat*. Common Article 3 thus prohibits the following: "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; 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 indispensible by civilized peoples." *E.g.* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

<sup>49.</sup> Press Release, White House Office of the Press Sec'y, *supra* note 47. The Third Geneva Convention affords Prisoners of War substantially greater protections than other detainees in armed conflicts. *See* Geneva Convention III, *supra* note 48, sec. II (requiring specific treatment applicable only to Prisoners of War).

<sup>50.</sup> Press Release, White House Office of the Press Sec'y, *supra* note 47.

and Iraq<sup>51</sup> where they were neither limited nor safeguarded."<sup>52</sup>

American interrogators admitted that these techniques were at best on the edge of legality under both U.S. and international law. While a Staff Judge Advocate noted in a memo in November 2002 that "none of the interrogation techniques used or observed . . . constitutes torture," the memo continued to admit that "another observer might disagree." The memo also observed, "although the techniques may not constitute 'torture' they may rise to the level of cruel, inhuman, or degrading treatment proscribed by international law." Despite these concerns, a standard operating procedure (SOP) for interrogations in Afghanistan was approved in January 2003,55 and American interrogators began to use "enhanced interrogation techniques" on detainees in Afghanistan shortly thereafter. 56

<sup>51.</sup> To clarify, neither Iraq nor Cuba has ratified the Rome Statute. *The States Parties to the Rome Statute*, Int'l Criminal Court, http://www.icc-cpi.int/Menus/ASP/states+parties/ (last visited Nov. 13, 2011). Therefore, even if all "enhanced interrogation techniques" are found to constitute torture, cruel treatment, or outrages upon personal dignity in violation of article 8 of the Rome Statute, only those instances of conduct perpetrated in Afghanistan would fall within the Court's jurisdiction. *See* Rome Statute, *supra* note 2, art. 12(2) (limiting the exercise of jurisdiction to circumstances where the alleged conduct occurred on the territory of, or was committed by a national of, a State party or a State that has accepted the jurisdiction of the court).

<sup>52.</sup> Indep. Panel to Review DOD Det. Operations, Final Report (2004), *available at* http://www.defense.gov/news/Aug2004/d20040824final report.pdf.

<sup>53.</sup> Staff of S. Comm. on Armed Services, 110th Cong., Inquiry into the Treatment of Detainees in U.S. Custody 152 (Comm. Print 2008) [hereinafter S. Comm. on Armed Services Report].

<sup>54.</sup> Id.

<sup>55.</sup> Id. at 153.

<sup>56.</sup> *Id.* at 115 (citing a January 24, 2003 memo written by LTC Robert Cotell, Deputy Staff Judge Advocate, describing techniques then in use in Afghanistan); *id.* at 159–60 (citing a list of techniques used by SMU TF in Iraq and Afghanistan given to U.S. Central Command on June 8, 2003); *id.* at 210 (confirming that stress positions were used in Afghanistan in 2002 and 2003); *id.* at 211 (confirming that removal of clothing was recommended as an effective technique and subsequently considered approved policy in Afghanistan).

"Enhanced interrogation techniques" were generally broken into three categories of escalating severity. Tategory I techniques included yelling at the detainee. Category II techniques included the use of dogs in interrogations, forced nudity, hooding, stress positions, isolation for up to thirty days, interrogation for up to twenty hours, deprivation of light, and playing of loud music. Category III techniques included waterboarding, use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family . . . [e]xposure to cold weather or water . . . [and] [u]se of mild, non-injurious physical contact. Additional approved techniques inflicted upon detainees in Afghanistan included prolonged sleep deprivation and dietary manipulation, forced shaving, use of female

<sup>57.</sup> Memorandum from Jerald Phifer to Commander, Joint Task Force 170, "Request for Approval of Counter-Resistance Strategies" (Oct. 11, 2002) [hereinafter Phifer memo], available at http://www.defense.gov/news/Jun2004/d20040622doc3.pdf.

<sup>58.</sup> Id. at 1.

<sup>59.</sup> Id. at 1-2.

<sup>60.</sup> *Id.* at 2. The Phifer memo describes the technique as the "use of a wet towel and dripping water to induce the misperception of suffocation." *Id.* In his memo to the Acting General Counsel of the CIA, Jay Bybee provides a more elaborate description of waterboarding:

<sup>[</sup>T]he individual is bound securely to an inclined bench which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual's blood. This increase in the carbon dioxide level stimulates increased efforts to breathe. This effort plus the cloth produces the perception of 'suffocation and incipient panic,' i.e., the perception of drowning. . . . [T]his procedure triggers an automatic physiological sensation of drowning that the individual cannot control even though he may be aware that he is in fact not drowning.

Memorandum from Jay Bybee, Assistant Attorney General, to John Rizzo, Acting General Counsel of the Central Intelligence Agency, "Interrogation of Al Qaeda Operative," 3–4 (Aug. 1, 2002) [hereinafter Classified Bybee Memo], available at http://media.luxmedia.com/aclu/olc\_08012002\_bybee.pdf.

<sup>61.</sup> Phifer memo, *supra* note 57, at 2–3.

interrogators to create discomfort, and "mild" physical contact.  $^{62}$ 

The International Committee for the Red Cross (ICRC) affirmed that the following "enhanced interrogation techniques" were inflicted upon detainees at Bagram Air Force Base in accordance with U.S. interrogation policies: suffocation by water (or waterboarding), prolonged standing in stress positions (resulting in detainees being forced to urinate and defecate on themselves),<sup>63</sup> forced nudity, cramped confinement in a box, prolonged nudity, sleep deprivation combined with stress positions, exposure to cold temperatures, prolonged shackling, and food deprivation and restriction.<sup>64</sup>

In practice, the "enhanced interrogation techniques" often became floors rather than ceilings of severity. M. Cherif Bassiouni described this escalation, noting "among some examples that may illustrate what was deemed permissible and which were actually carried out are: forcing a father to watch the mock execution of his 14 year old son; placing a lit cigarette in the ear of a detainee to burn his eardrum; bathing a detainee's hand in alcohol and then lighting it on fire; shackling detainees to the floor for 18-24 hours; and gagging detainees in order to create the effect of drowning in one's own saliva; forcing a detainee to squat for periods up to and beyond 24 hours; crushing a detainee's bare hands and feet with boots; inflicting beatings with bare knuckles and hard objects; striking with the knees and boots in body locations known to cause severe pain and suffering; withholding medical treatment of the injured; and so on."65 The ICRC affirmed the perpetration of abuses outside even the bounds of official "enhanced interrogation techniques" policy, including threats of ill treatment both to the detainee and to his family, including "of waterboarding, electric shocks, infection with HIV, sodomy, arrest and rape of the detainee's family, torture, being brought close to death, and of an interrogation process where 'no rules applied.' "66

<sup>62.</sup> S. Comm. on Armed Services Report, supra note 53, at 113-14.

<sup>63.</sup> ICRC REPORT, supra note 26, at 12.

<sup>64</sup> Id at 9

<sup>65.</sup> M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 Case W. Res. J. Int'l L. 389, 399 (2006).

<sup>66.</sup> ICRC REPORT, supra note 26, at 17.

The Court has not yet evaluated these specific techniques against the relevant provisions of article 8. However, interpretative guidelines in the Court's statutory instruments strongly support the contention that these techniques fall within the scope of the Rome Statute's prohibitions on torture<sup>67</sup> and outrages upon personal dignity.<sup>68</sup> The Elements of Crimes, a document providing more detailed elements of the crimes enumerated in articles 6, 7, and 8 of the Rome Statute, specifies that, to constitute the war crime of torture,69 the perpetrator must inflict "severe physical or mental pain or suffering" upon a person made *hors de combat* or taking no part in hostilities for the purpose of "obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of any kind."70 To constitute the war crime of outrages upon personal dignity, the Elements of Crimes requires humiliation or degradation severe enough "as to be generally recognized as an outrage upon personal dignity," perpetrated upon persons made hors de combat or taking no part in hostilities.<sup>71</sup> "Enhanced interrogation techniques" were designed and deployed precisely to obtain information or confessions from detainees in U.S. custody.<sup>72</sup> While the socalled "torture memos," which sanctioned the use of "enhanced interrogation techniques," contended that the tech-

<sup>67.</sup> As a war crime, relevant to the allegations here, see Int'l Criminal Court, Elements of Crimes, art. 8(2)(i)-4 [hereinafter Elements of Crimes], *in* Assembly of States Parties Official Records, 1st sess., Sept. 3–10, 2002, at 108, U.N. Doc. ICC-ASP/1/3 (2002).

<sup>68.</sup> As a war crime, relevant to the allegations here, see *id.* art. 8(2)(c)(ii).

<sup>69.</sup> To constitute any kind of war crime, the Rome Statute Elements of Crimes also requires the existence of an armed conflict and awareness of the factual circumstances establishing the existence of that armed conflict. *See, e.g., id.* art. 8(2)(c)(i)-4 (5) ("The conduct took place in the context of and was associated with an armed conflict not of an international character."); *id.* art. 8(2)(c)(i)-4 (6) ("The perpetrator was aware of factual circumstances that established the existence of an armed conflict.").

<sup>70.</sup> *Id.* art. 8(2)(c)(i)-4(1)-(3).

<sup>71.</sup> *Id.* art. 8(2)(c)(ii).

<sup>72.</sup> At the point that the detainees were taken into U.S. custody, they would be considered *hors de combat* under the Geneva Conventions. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 41, June 8, 1977, 1125 U.N.T.S. 3 ("A person is *hors de combat* if . . . he is in the power of an adverse party.").

niques did not cause sufficient physical or mental pain as to constitute torture, their analysis has been roundly criticized<sup>73</sup> and the memos were subsequently withdrawn.<sup>74</sup>

Other persuasive sources of international law also support an analysis of some of these techniques as prohibited at least as inhuman and degrading treatment, if not as torture.75 The European Court of Human Rights (ECHR) evaluated five "enhanced interrogation techniques"—stress positions, hooding, subjection to loud noise, sleep deprivation, and dietary manipulation—against prohibitions against torture.<sup>76</sup> Twelve judges found that although the techniques did not constitute torture, they did constitute inhuman and degrading treatment, while another four judges found that the techniques constituted both inhuman and degrading treatment and torture.<sup>77</sup> The four judges found that individual techniques may constitute torture if applied in combination even if they would not constitute torture individually.<sup>78</sup> The Committee Against Torture has also found the following techniques to be torture or inhuman and degrading treatment: "restraining in very painful conditions, hooding under special conditions, sounding of loud music for prolonged periods, sleep deprivation for pro-

<sup>73.</sup> See, e.g., Edward Alden, Dismay at Attempt to Find Legal Justification for Torture, Fin. Times, June 10, 2004 (citing criticism by Harold Koh of the memos as "blatantly wrong" and "erroneous legal analysis"); Adam Liptak, Legal Scholars Criticize Memos on Torture, N.Y. Times, June 25, 2004, at A14 (citing criticism by Cass Sunstein of the memos as "egregiously bad... very low level . . . very weak, embarrassingly weak, just short of reckless").

<sup>74.</sup> Withdrawing the Torture Memos, Human Rights First (Sept. 4, 2007), http://www.humanrightsfirst.org/2007/09/04/withdrawing-the-torture-memos.

<sup>75.</sup> Torture has been analyzed as a more severe form of inhuman and degrading treatment. *See, e.g.*, Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978).

<sup>76.</sup> *Id.* at 44, ¶ 96.

<sup>77.</sup> *Id.* at 66–67, ¶¶ 167–68. The court voted sixteen to one that the use of the techniques constituted inhuman and degrading treatment. The court also voted thirteen to four that the use of the techniques did *not* constitute torture. *Id.* at 94. Judges Zekia, O'Donoghue, Evrigenis, and Matscher annexed separate opinions arguing that the five techniques constituted torture, in addition to being inhuman and degrading treatment. *Id.* at 97, 102, 136, 139 (separate opinions of Judges Zekia, O'Donoghue, Evrigenis, and Matscher). Judge Fitzmaurice, on the other hand, argued that use of the techniques did not even amount to inhuman or degrading treatment. *Id.* at 110 (separate opinion of Judge Fitzmaurice).

<sup>78.</sup> Id.

longed periods, threats, violent shaking, using cold air to chill."<sup>79</sup> While the findings of the European Court of Human Rights and the Committee Against Torture are not binding on the International Criminal Court, their persuasive interpretations of international law regarding torture and inhuman treatment bolster arguments that the conduct in question is also prohibited under article 8 of the Rome Statute.

In sum, the establishment and official sanction of "enhanced interrogation techniques" eroded longstanding protections guaranteed to detainees by the U.S. military. This erosion consequently enabled escalation to even more blatant forms of torture, for example, as was revealed at Abu Ghraib.<sup>80</sup> By 2006, years of implementing and sanctioning these abusive interrogation practices resulted in "the estimated deaths of over 200 detainees in U.S. custody, presumably as a result of torture."

### B. Persons Likely to Be the Focus of Investigation by the Court

The Rome Statute expressly contemplates individual criminal responsibility for senior officials and commanders. Article 25(3)(b) deems a person criminally responsible if he "orders, solicits, or induces the commission of a crime which in fact is committed or attempted." Article 28 imposes criminal responsibility on superiors for acts of subordinates as long as requisite intent or knowledge requirements are met.<sup>82</sup> As affirmed in

<sup>79.</sup> Jordan Paust, Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees, 43 Colum. J. Transnat'l L. 811, 846 (2004).

<sup>80.</sup> I am grateful to Darren Geist for highlighting this point.

<sup>81.</sup> Bassiouni, supra note 65, at 390.

<sup>82.</sup> Article 28(a) establishes command responsibility for military commanders or those "effectively acting as . . . military commander[s]," requiring both that the commander "either knew or, owing to the circumstances at the time, should have known" that the crimes were being committed and that the commander "failed to take all necessary steps and reasonable measures within his or her power" to prevent the commission of the offenses or punish the offenders. Rome Statute, *supra* note 2, art. 28(a). Article 28(b) establishes command responsibility for non-military commanders, requiring both that "the superior either knew or consciously disregarded information which clearly indicated" that subordinates were committing the crimes, that the crimes "concerned activities that were within the effective responsibility and control of the superior," and that the superior "failed to take all neces-

the executive summary of the Senate Armed Services Committee Hearing on the Treatment of Detainees in U.S. Custody,

the abuse of detainees in U.S. custody cannot simply be attributed to the actions of a few bad apples acting on their own. The fact is that senior officials in the U.S. government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.<sup>83</sup>

Senior Bush Administration officials, in conjunction with senior officials in the Central Intelligence Agency (CIA) and Department of Defense (DOD), developed, sought legal cover for, and implemented "enhanced interrogation techniques" in Afghanistan and Iraq and at Guantanamo Bay. Given the OTP's policy of pursuing the most responsible perpetrators implicated in the set of crimes, it is likely that these former officials would be the focus of the Court's action.<sup>84</sup>

Lawyers at the Office of Legal Counsel (OLC)<sup>85</sup> would likely fall within the set of perpetrators of interest to the Court. These lawyers aggressively twisted long-established and absolute prohibitions on torture to provide a façade of legal cover to the perpetrators.<sup>86</sup> The roundly criticized torture memos,<sup>87</sup>

sary steps and reasonable measures within his or her power" to prevent the commission of the offenses or punish the offenders. *Id.* art. 28(b).

<sup>83.</sup> S. COMM. ON ARMED SERVICES REPORT, supra note 53, at xii.

<sup>84.</sup> PROSECUTORIAL STRATEGY 2009–2012, *supra* note 41, ¶ 14. *See also* Assembly of States Parties, Report of the Bureau on Stocktaking: Complementarity, ¶ 12, ICC-ASP/8/51 (Mar. 10, 2010) ("The Court will never be able to prosecute all those responsible for crimes under its jurisdiction in a given situation. Whilst not prescribed by the Statute, the Prosecutor has taken a policy decision to focus prosecutions on those bearing the greatest responsibility for the most serious crimes."); Kenya Authorization Decision, *supra* note 5, ¶¶ 58–60 (explaining that the gravity threshold analysis includes an "assessment of whether such groups of persons that are likely to form the object of investigation capture those who may bear the greatest responsibility for the alleged crimes committed").

<sup>85.</sup> The Office of Legal Counsel is a division of the United States Department of Justice. It is charged with "provid[ing] authoritative legal advice to the President and all the Executive Branch Agencies." For more information about the OLC and its role in the United States government, see *Office of Legal Counsel*, U.S. Dep't of Justice, http://www.justice.gov/olc (last updated Sept. 2011).

<sup>86.</sup> José E. Alvarez, *Torturing the Law*, 17 Case W. Res. J. Int'l L. 175, 179–187 (2005). *See also* Human Rights Watch, Getting Away With Tor-

produced by OLC attorneys John Yoo and Jay Bybee, interpreted the elements of the American federal crime of torture to require mental harm to last "months or years" to be considered sufficiently prolonged to constitute torture.88 As a result, even waterboarding was deemed to be below the proscribed threshold, classified as "simply a controlled acute episode, lacking the connotation of a protracted period of time generally given to suffering."89 Moreover, the authors of these memos embraced an extreme interpretation of the specific intent for the crime of torture as requiring "specific intent to cause prolonged mental harm," noting that "a defendant acts in good faith when he has an honest belief that his actions will not result in severe pain or suffering."90 The push toward authorization came directly from senior officials: as noted by the Special Mission Unit Task Force (SMU TF) Legal Advisor, "[The Secretary of Defense's] approval of these techniques [stress positions, isolation, hooding, removal of clothing, use of dogs] provides us the most persuasive argument for use of 'advanced techniques.'"91 The official sanction of "enhanced

TURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES 7 (2011) ("The problem is that the legal advice in question—contained in memoranda drafted by the OLC, which provides authoritative legal advice to the president and all executive branch agencies—itself authorized torture and other ill-treatment. It purported to give legal sanction to practices like waterboarding, as well as long-term sleep deprivation, violent slamming of prisoners into walls, forced nudity, and confinement of prisoners into small, dark boxes.").

<sup>87.</sup> See supra note 73.

<sup>88.</sup> Classified Bybee Memo, supra note 60, at 15.

<sup>89.</sup> Id. at 11.

<sup>90.</sup> Id. at 16-17.

<sup>91.</sup> S. Comm. On Armed Services Report, *supra* note 53, at 154 (citing Memorandum from [redacted] to COMJTF-5, "Legal Review of [redacted] Battlefield Interrogation Team & BIT SOP," 11 (Jan. 11, 2003)). The Department of Defense Working Group, formed in 2003 to evaluate EITs, further described techniques "in use with ancillary military training processes such as SERE schools"—including waterboarding, wall standing, stress positions, enforced physical training, facial slap, and use of drugs—as "proven to be effective." It is interesting to note that these techniques were not used by interrogators on detainees but instead by trainers as part of resistance training provided to American soldiers who may be captured and mistreated by enemy forces. In the Working Group's subsequent draft one month later, this identification had been changed to claim only these techniques were "considered effective by interrogators and for which USSOUTHCOM and USCENTCOM have requested approval." This explicit shift in language

interrogation techniques" combined with the unwavering defense of such practices by former Administration officials, including former President Bush,<sup>92</sup> clearly establish the direct involvement of these officials in ordering the abusive techniques.

At this point, there is no comparable evidence indicating that the Bush Administration ordered or sanctioned abuses exceeding the boundaries of the "enhanced interrogation techniques", and it is therefore unlikely that criminal responsibility for those acts could be sustained under article 25. However, the doctrine of command responsibility, 93 established by article 28, could allow individual criminal responsibility for those abuses. As Bassiouni notes,

the law of command responsibility brooks no question that when military commanders in the chain of command issue orders or are aware of the practices of torture and fail to prevent the commission of such a crime, they are personally responsible. The same applies when they discover these crimes and fail to investigate them and prosecute those responsible for the deeds.<sup>94</sup>

Detainees in detention facilities controlled by the United States suffered abuses even exceeding the outer bounds of the "enhanced interrogation techniques." This track record of abuse strongly argues that military commanders "knew, or, owing to the circumstances at the time should have known" that such crimes were being committed.<sup>95</sup> Moreover, the ongoing

conveys the intent to provide a more clear and affirmative recommendation for the techniques' use in Afghanistan, Iraq, and Guantanamo. *Id.* at 123–24.

<sup>92.</sup> For example, when then Director of Central Intelligence, George Tenet, asked former president George W. Bush if he had permission to waterboard Khalid Sheikh Mohammed, Bush responded, "Damn Right." Adam Ainger-Treworgy et al., *Bush on Waterboarding: 'Damn Right*, 'CNN (Nov. 5, 2010, 7:13 PM), http://www.cnn.com/2010/POLITICS/11/05/bush.book/index.html (quoting George W. Bush, Decision Points (2010)).

<sup>93.</sup> Command responsibility, governed by article 28 of the Rome Statute, is a separate mode of individual criminal responsibility, distinct from the responsibility conferred by ordering, soliciting, or inducing the commission of a crime, governed by article 25 of the Rome Statute. Rome Statute, *supra* note 2, art. 25, 28.

<sup>94.</sup> Bassiouni, supra note 65, at 408.

<sup>95.</sup> Rome Statute, supra note 2, art. 28(a)(i).

and prevalent nature of such abuses up to the point of public exposure by the news media of Abu Ghraib<sup>96</sup> seems clearly to establish that the commanders "failed to take all reasonable and necessary measures" to prevent their commission or punish the direct perpetrators.<sup>97</sup>

It is arguable whether former President Bush would qualify as a military commander under article 28 due to his status at the time as Commander in Chief of the nation's armed forces. Persident Dick Cheney, former Secretary of Defense Donald Rumsfeld, and former OLC lawyers John Yoo and Jay Bybee, among others—would qualify as non-military. Therefore, the relevant provision of the Rome Statute governing their command responsibility is article 28(b). The detailed involvement of the Bush Administration and senior officials at the CIA and DOD in the development of "enhanced interrogation techniques" affirms that the interrogation of detainees in U.S. custody was well within the "effective responsibility and control" of these officials, 99 even if they were not physically onsite.

Article 28(b) of the Rome Statute requires that the non-military commander either "knew or consciously disregarded" information suggesting that such crimes were being committed. Policies implementing "enhanced interrogation techniques" in the field diluted or removed rules of detention and interrogation contained in the Geneva Conventions and overruled prior guidelines contained in the Army Field Manual. Such removal of existing protections for detainees and guidelines for interrogations created an environment that enabled the perpetration of broader abuses. More information will be required to determine what exactly was reported up the chain of command to these non-military commanders, and what information they consciously disregarded relating to es-

<sup>96.</sup> To be clear, Abu Ghraib is not within the Court's jurisdiction and therefore not directly relevant to the situation in Afghanistan. *See supra* note 51.

<sup>97.</sup> Rome Statute, *supra* note 2, art. 28(a)(ii).

<sup>98.</sup> Article II of the United States Constitution bestows this authority on a civilian elected President. U.S. Const. art. II, § 2.

<sup>99.</sup> Rome Statute, *supra* note 2, art. 28(b)(ii).

<sup>100.</sup> Id. art. 28(b)(i).

<sup>101.</sup> Paust, *supra* note 79, at 847.

<sup>102.</sup> I am grateful to Darren Geist for making this point.

calated abuses outside the boundaries of "enhanced interrogation techniques," before concretely establishing individual criminal responsibility based on command responsibility for any of the above alleged perpetrators. However, the existing evidence clearly establishes the active complicity of Bush Administration and other high-ranking governmental officials in ordering the infliction of "enhanced interrogation techniques" upon detainees in U.S. custody.

# C. Domestic Investigative Responses to the Set of Potential Cases

The United States took a variety of steps in response to the allegations of detainee abuse in Afghanistan. By 2006, an estimated 120 lower-level perpetrators had been court-martialed103 for conduct exceeding the boundaries of "enhanced interrogation techniques." By 2007, "ten internal investiga-tions had been conducted by various executive branch and military departments, [although] only one investigator was authorized to examine the chain of command extending to [former] Secretary of Defense Donald Rumsfeld."104 Conducted by the Inspector General within each department or agency, these investigations produced reports detailing the involvement of the CIA, Federal Bureau of Investigation (FBI), DOD, and Department of Justice (DOJ), among others, in the development and implementation of abusive interrogation techniques. The DOJ Office of Professional Responsibility (OPR) investigated the OLC lawyers involved in writing the memos authorizing the use of "enhanced interrogation techniques"; however, Associate Deputy Attorney General David Margolis overruled subsequent recommendations for disciplinary sanctions. Congressional hearings, convened to look into the sanctioning, implementation, and escalation of "enhanced interrogation techniques," also inquired into the involvement of senior military and administration officials.

Courts-martial strongly resemble criminal trials. Because of this close similarity, they will not be analyzed alongside the strictly non-criminal mechanisms for compliance with article 17(1)(b). Rather, courts-martial are likely to be considered functionally equivalent to prosecutions. However, because these proceedings were both structurally and functionally lim-

<sup>103.</sup> Bassiouni, supra note 65, at 407.

<sup>104.</sup> Martin, supra note 46, at 125.

ited in scope,<sup>105</sup> investigating only the lowest-level direct perpetrators, they are insufficient by themselves to present a complementarity challenge to the situation in Afghanistan.<sup>106</sup> The remaining proceedings—department and agency Inspector General inquiries, the OPR inquiry, and congressional hearings—are clearly not criminal investigations. The question remains of whether these proceedings can be considered investigations under article 17.

Congressional hearings cannot directly impose or preclude subsequent criminal prosecutions. The hearings regarding treatment of detainees in U.S. custody publically evaluated the specific techniques inflicted upon detainees and the culpability of senior officials. These hearings traced the development and official implementation of "enhanced interrogation techniques" to the highest levels of the United States government at the time.

Inspectors General (IGs) are internally based at each government agency, and are considered "statutorily independent." The IG reports investigating "enhanced interrogation techniques" involved detailed fact-finding based on allegations of detainee abuse and produced final reports focused on each agency's involvement. In investigating the allegations of detainee abuse, the agency IGs interviewed relevant witnesses and reviewed classified and unclassified evidence. The resulting reports detailed the process and consequences of implementing the so-called "enhanced interrogation techniques" and described the involvement of the relevant agency's personnel, including senior leadership. Agency IGs have the power to refer cases to the DOJ for review and potential inves-

<sup>105.</sup> This preliminary reference to courts-martial is merely to indicate briefly why the non-criminal investigative mechanisms must be evaluated under article 17.

<sup>106.</sup> In an analogous ruling, the Pre-Trial Chamber found the presence of a similar number of actual criminal prosecutions exclusively focusing on lower-level perpetrators and involving relatively minor charges did not make the situation in Kenya inadmissible before the Court on complementarity grounds. Kenya Authorization Decision, *supra* note 5, ¶¶ 184–85. For a full discussion of the requisite scope of investigations under article 17, see *infra* text accompanying notes 162–180.

<sup>107.</sup> The Office of the Director, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/additional-publications/the-work-of-a-nation/cia-director-and-principles/the-office-of-the-director.html (last updated Sept. 27, 2011).

tigation and prosecution. They do not, however, have authority to initiate such a prosecution independently.

The DOJ is charged with investigating and prosecuting federal crimes. However, the OLC lawyers involved in the sanction of "enhanced interrogation techniques" were not investigated by the DOI criminal division; rather, they were investigated by the DOJ Office of Professional Responsibility. The OPR is "responsible for investigating allegations of misconduct involving [DO] attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice."108 The OPR investigation into the OLC attorneys followed specified procedures: requesting responses from Yoo and Bybee as well as from other relevant individuals with knowledge of the allegations,109 inquiring into supporting or contradictory evidence, and evaluating alleged conduct against the regulations of the state bar of which the attorney in question is a member. 110 In addition, the OPR gave Yoo and Bybee opportunities to respond in writing to its allegations and findings before issuing a final report.<sup>111</sup>

The final OPR report found that Yoo "committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid advice." It found that Bybee "committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and

<sup>108.</sup> Office of Professional Responsibility, U.S. DEP'T OF JUSTICE, http://www.justice.gov/opr (last updated Dec. 2010). For a general description of OPR procedures for investigations, see Office of Prof'l Responsibility, About the Office, U.S. DEP'T OF JUSTICE, http://www.justice.gov/opr/about-opr.html (last updated Dec. 2010).

<sup>109.</sup> For example, former officials within the CIA, DOD, and Bush Administration, among others, who interacted with Yoo and Bybee about "enhanced interrogation techniques" during the design and implementation of these techniques. Office of Prof'l Responsibility, U.S. Dep't of Justice, 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 6–7 (2009) [hereinafter OPR Report], available at http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf.

<sup>110.</sup> Id. at 12-13, 20.

<sup>111.</sup> Id. at 9-10.

<sup>112.</sup> Id. at 11.

render thorough, objective, and candid legal advice."<sup>113</sup> The OPR recommended referral of both cases to the relevant state bars for disciplinary action.<sup>114</sup> In addition, the report explicitly addressed the possibility of criminal investigations and prosecutions, recommending "that, for the reasons discussed in this report, the Department [of Justice] review certain declinations of prosecution regarding incidents of detainee abuse referred to the Department by the CIA [Office of Inspector General]."<sup>115</sup> However, no subsequent sanctions have been imposed on either Yoo or Bybee;<sup>116</sup> rather, Associate Deputy Attorney General David Margolis overruled the report's recommendations, citing procedural and methodological flaws.<sup>117</sup>

#### D. Decisions Not to Prosecute the Alleged Offenders

Under article 17(1)(b), a domestic investigation must be followed by a genuine decision not to prosecute in order to mandate the Court's deference. In evaluating the complementarity challenge presented by Germain Katanga, the Appeals Chamber found that the Democratic Republic of Congo's decision to transfer Katanga to The Hague did not constitute a "decision not to prosecute" under article 17(1)(b), even though the DRC technically decided not to prosecute Katanga domestically. The Appeals Chamber

<sup>113.</sup> Id. at 11.

<sup>114.</sup> Id. at 260, n.211.

<sup>115.</sup> Id. at 11.

<sup>116.</sup> I am grateful to José Alvarez for highlighting the importance of this point.

<sup>117.</sup> Memorandum from David Margolis, Associate Deputy Attorney General, to the Attorney General, "Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists," 2 (Jan. 5, 2010) [hereinafter Margolis Memo].

<sup>118.</sup> Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 82 (Sept. 25, 2009), http://www.icc-cpi.int/iccdocs/doc/doc746819.pdf [hereinafter Katanga Appeals Decision].

clarified that article 17(1)(b) instead requires a decision that the individual should not be prosecuted at all, by any entity. 119

The Court's current interpretations of article 17(1)(b) still leaves open the question of whether that decision must be explicit and affirmative. Ben Batros suggests that the decision not to prosecute must be affirmatively made by the state. However, the Appeals Chamber's interpretation of the DRC's actions with regard to Katanga suggests that an explicit decision may not be necessary to convey intent that a particular perpetrator not be prosecuted. The Appeals Chamber examined the DRC's actions with respect to Katanga and held that those actions could not credibly manifest a decision that Katanga should not be prosecuted. Pather, the Appeals Chamber interpreted the decision to transfer Katanga to the Court as a clear indication that the DRC decided Katanga should be prosecuted for his crimes, and that the Court should be the entity to prosecute him.

The combination of actions and statements by the Obama Administration, Congress, and the DOJ, combined with the significant amount of time now passed since the conclusions of the aforementioned inquiries, all strongly indicate that the United States has at this point decided not to prosecute any senior-level alleged perpetrators for war crimes committed in Afghanistan. All investigations of senior officials to date have occurred outside of the American criminal justice system. Despite the proliferation of evidence demonstrating the active involvement of senior officials in the development and implementation of torture in Afghanistan, there have been no criminal prosecutions or even indictments of the investigated officials. Moreover, President Barack Obama and members

<sup>119.</sup> *Id.* The Appeals Chamber found that the DRC's actions in arresting and detaining Katanga and then transferring him to the ICC for subsequent prosecution clearly indicated an intent that Katanga should be prosecuted for the crimes in question, even though the DRC did not intend to prosecute Katanga itself for those crimes. *Id.* 

<sup>120.</sup> Ben Batros, *The Evolution of ICC Jurisprudence on Admissibility, in* The International Criminal Court and Complementarity, *supra* note 23 (manuscript at 14), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1537605.

<sup>121.</sup> Katanga Appeals Decision, supra note 118, ¶ 82.

<sup>122.</sup> *Id*.

<sup>123.</sup> There have been a number of courts-martial, but only for lower-level direct perpetrators. Whether these proceedings alone can successfully jus-

of his Administration have publicly stated that the current Administration does not intend to prosecute former Bush Administration officials for torture.<sup>124</sup> Still, the fact that the United States decided not to prosecute the relevant set of cases does not automatically bar Court action on complementarity grounds unless the remaining elements of article 17(1)(b) are satisfied. Article 17(1)(b) also requires both that the state first investigated the relevant set of cases before deciding not to prosecute, and that those inquiries and decisions were genuine.

#### III. Non-Criminal Investigations Under Article 17

The Court has repeatedly interpreted article 17 to require a mechanical two-part test. First, the state with jurisdiction must have actually investigated and either prosecuted or decided not to prosecute. Second, only if such concrete state action can be found must the Court examine whether the action was genuine, or whether instead the state was unwilling or unable to genuinely act. This note has argued above that the Obama Administration's statements and actions disclaiming intent to prosecute any high-ranking perpetrators clearly demonstrate a decision not to prosecute under article 17(1)(b). However, Article 17(1)(b) also requires an investigation that precedes the decision not to prosecute. Applying the two-step complementarity framework to the situation in Afghanistan, therefore, the Court would remain able to freely

tify a complementarity challenge will be addressed in the next section of the article.

<sup>124.</sup> See, e.g., Office of the Press Sec'y, Statement of President Barack Obama on Release of OLC Memos, The White House (Apr. 16, 2009), http://www.whitehouse.gov/the\_press\_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos; Aide: Obama Won't Prosecute Bush Officials, CBS News, Apr. 20, 2009, http://www.cbsnews.com/stories/2009/04/20/politics/main4955428.shtml; Scott Horton, AP: Obama Will Not Prosecute War Crimes, Harper's Magazine, Nov. 18, 2008, http://www.harpers.org/archive/2008/11/hbc-90003867.

<sup>125.</sup> Cf. Darryl Robinson, The Inaction Controversy: Neglected Words and New Opportunities, in The International Criminal Court and Complementarity, supra note 23 (manuscript at 1–2), available at http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1723396 (arguing that a two-part test is expressly provided for by article 17 of the Rome Statute).

<sup>126.</sup> Katanga Appeals Decision, *supra* note 118, ¶ 78.

<sup>127.</sup> Id.

investigate and prosecute crimes committed in Afghanistan without any inquiry into the willingness or ability of the United States to genuinely act *unless* it first found that the United States' existing non-criminal proceedings qualify as investigations under article 17(1) (b).

In its rebuttal to the admissibility challenge posed by Germain Katanga, the OTP suggested a functional definition of the term "investigation." The OTP emphasized the absence of "procedurally significant [proceedings] that have been established and that could support the allegations that were made [against Katanga],"128 and highlighted the lack of witnesses and suspect interviews, lack of seizures of evidence, and absence of any fact-finding inquiries beyond a "single NGO report."129 Ben Batros also appears to view an "investigation" as defined at least partially through its processes and thus requiring "the existence of identifiable and meaningful investigative steps, and the incidents or conduct in respect of which these steps are taken constitute the scope of the case being investigated."130 However, the mere fact that these procedural elements are necessary components of an "investigation" under article 17 does not automatically make them sufficient to qualify a proceeding as such.

Based on the text of article 17(1)(b) alone, the term "investigation" can have two plausible alternative interpretations: either an investigation undertaken within the criminal justice system, or a fact-finding mechanism either within or outside the criminal justice system that potentially provides the basis for a subsequent prosecution.<sup>131</sup> The Court has not yet addressed the specific question of whether non-criminal investigations are categorically excluded from the scope of article 17, even if they maintained analogous processes. Still, Chambers rulings on complementarity, strategy and policy statements by the OTP, and the drafting history of the Rome Statute all pro-

<sup>128.</sup> Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Prosecution's Response to Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber "Motifs de la décision oral relative à l'exception d'irrecevabilité de l'affaire," ¶ 28 (July 31, 2009), http://www.icc-cpi.int/iccdocs/doc/doc/19026.pdf.

<sup>129.</sup> Id.

<sup>130.</sup> Batros, *supra* note 120 (manuscript at 13).

<sup>131.</sup> Rome Statute, *supra* note 2, art. 17(1)(b). I am grateful to José Alvarez for raising this point.

vide relevant guidance about whether "institutional arrangements which do not correspond to the classical criminal trial trigger the application of the complementarity principle."<sup>132</sup>

Arguments that the first prong of the complementarity inquiry refers only to domestic criminal investigations often cite the foundational purpose of the Court as combating impunity for international crimes through an international criminal justice mechanism. Article 1 of the Rome Statute states clearly that the Court is "complementary to national criminal jurisdictions." The Appeals Chamber has further affirmed that "states have a duty to exercise their criminal jurisdiction over international crimes," explicitly referencing criminal proceedings. 135

In its application to open an investigation into the situation in Kenya, the OTP cited the absence of domestic criminal proceedings for the most serious post-election crimes as well as the absence of "any prospect of such prosecution" to support its contention that the situation in Kenya remained admissible before the Court. At that point, however, Kenya had initiated criminal prosecutions against a selection of low-level direct perpetrators for crimes associated with the post-election violence. Still, the Pre-Trial Chamber found these proceedings insufficient under article 17,137 and instead stated explicitly that there was no "state action" in Kenya regarding post-election violence. This wording may imply that the Chamber found Kenya to have taken no action at all in response to the post-election violence. However, the Chamber in fact as-

<sup>132.</sup> Dov Jacobs, A Samson at the International Criminal Court, 6 L. & Prac. of Int'l Courts & Tribunals 317, 326 (2007).

<sup>133.</sup> Carsten Stahn, Complementarity: A Tale of Two Notions, 19 CRIM. L.F. 87, 91–92 (2008). See also Allan Dickerson, Who's In Charge Here—International Criminal Court Complementarity and the Commander's Role in Courts-Martial, 54 NAVAL L. Rev. 141, 165 (2007) ("The entire thrust of the Rome Statute is to prevent states from shielding persons responsible for the gravest crimes from criminal responsibility.").

<sup>134.</sup> Rome Statute, *supra* note 2, art. 1. I am grateful to Rod Rastan for making this point.

<sup>135.</sup> Katanga Appeals Decision, *supra* note 118, ¶ 85 (emphasis added).

<sup>136.</sup> Kenya Authorization Decision, supra note 5, ¶ 183 (emphasis added). 137. Id. ¶¶ 183–85, 187.

<sup>138.</sup> Id. ¶ 54 ("[T]he available information indicates that there is a *situation of inactivity* with respect to the elements that are likely to shape the potential case(s)." (emphasis added)).

sumed quite the opposite, as evidenced by its statement that "national investigations and prosecutions [in Kenya] were directed against persons that fall outside of the category of those who bear the greatest responsibility and are likely to be the focus of the Prosecutor's investigation."<sup>139</sup>

A more plausible reading of the Pre-Trial Chamber's opinion is that the "state action" requirement is in fact narrower than its terms may indicate, requiring more than the demonstration of merely any action at all related to the situation. Instead, the domestic proceedings must reach the set of cases likely to come before the Court to qualify as "state action" sufficient to pose a complementarity challenge. The Chamber found that the domestic prosecutions in Kenya did not pose an admissibility challenge because they focused only on lower-level crimes and perpetrators, leaving untouched the broader post-election crimes and more senior perpetrators who were likely to be of interest to the Court. There was, therefore, no overlap between the Kenyan criminal prosecu-

<sup>139.</sup> Id. ¶ 185.

<sup>140.</sup> Id. ¶¶ 185, 187. The Pre-Trial Chamber also had occasion to consider Kenya's efforts in a challenge to the admissibility of the Ruto case submitted by the Kenyan Government. In rejecting the challenge, the Pre-Trial Chamber evaluated and deemed inadequate a range of information provided by the government of Kenya describing investigative steps taken in response to the post-election violence. The Pre-Trial Chamber held that a set of annexes submitted by the government of Kenya in support of its complementarity challenge were not directly relevant at all to the investigative process. Specifically, Kenya's submission of articles and statements indicating improved capacity of the newly reformed Kenyan justice system to conduct domestic proceedings were deemed irrelevant, affirming the prior Appeals Chamber holding that only current or past (but not future) state action satisfies the first prong of the complementarity test. Moreover, submissions that were deemed directly relevant to the investigative process were also deemed inadequate, either because they had not yet occurred at the time of the admissibility challenge, or because they failed to reach the same set of suspects now charged by the Court. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶¶ 64-65 (May 30, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1078822.pdf [hereinafter Ruto Admissibility Decision]. The Appeals Chamber supported this reasoning in its rejection of the government of Kenya's appeal. Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, 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

tions and the set of potential cases likely to be the focus of the Court's investigations. 141

In addition, Kenya at that point had not made any decision not to prosecute the alleged perpetrators of the post-election crimes against humanity. Rather, Kenya had begun to prosecute a different set of perpetrators and cases altogether. Therefore, the relevant complementarity provision for the Pre-Trial Chamber was article 17(1)(a), where a state with jurisdiction is investigating and prosecuting or has already done so, and not article 17(1)(b). The difference is critical. Article 17(1)(a) states that the Court must defer if a state with jurisdiction has investigated *and* prosecuted. This provision thus clearly requires the initiation of domestic criminal proceedings at some point to bar the Court's action on complementarity grounds. There is, however, no identical requirement imposed by article 17(1)(b). The difference is critical.

The Appeals Chamber ruled specifically on article 17(1)(b) in its rejection of a complementarity challenge posed by Germain Katanga. Similarly to the alleged perpetrators of torture in the United States, Katanga had not been criminally prosecuted by the Democratic Republic of Congo. However, at the time Katanga was transferred to the Court, the DRC had already arrested and detained him. Before that point, the DRC almost certainly had to have taken at least some prior investigative steps regarding Katanga and his alleged crimes. Still, the Appeals Chamber found that a state of inaction existed in the DRC with respect to Katanga.

Article 17(1)(b) requires both a domestic investigation and a subsequent decision not to prosecute in order to bar the

Statute" (Aug. 30, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf [hereinafter Kenya Admissibility Appeal].

<sup>141.</sup> Kenya Authorization Decision, *supra* note 5, ¶ 50 (explaining that admissibility is to be assessed against the "potential case[s]" that may be brought).

<sup>142.</sup> Rome Statute, supra note 2, art. 17(1)(a).

<sup>143.</sup> *Id.* art. 17(1)(b).

<sup>144.</sup> Katanga Appeals Decision, supra note 118, ¶ 60.

<sup>145.</sup> See id. ¶ 80 ("Any investigation that may have been ongoing regarding [Katanga] was closed when he was surrendered to the Court.").

<sup>146.</sup> See id. ¶ 82 ("[T]he Appeals Chamber considers that article 17 (1) (a) does not present a bar to his prosecution before the International Criminal Court.").

Court's action.<sup>147</sup> The Appeals Chamber did not specifically rule on the compatibility of the DRC's investigative mechanisms preceding Katanga's transfer to the Court with the term "investigation" in article 17(1)(b). Rather, the Chamber found that the DRC never made a decision not to prosecute.<sup>148</sup> Following its initial investigative activities regarding Katanga, the DRC decided to transfer him to the Court for prosecution rather than to prosecute him domestically. The Appeals Chamber found this sequence as a whole insufficient to bar the Court's action on complementarity grounds. Therefore, although the Appeals Chamber interpreted this sequence of events as a "state of inaction" with respect to Katanga in the DRC,<sup>149</sup> a more precise description instead seems to be a state of *incomplete* action in the DRC under article 17(1)(b).

For similar reasons, the Pre-Trial Chamber, in its ruling on the admissibility of the situation in Kenya, appeared to assume (but did not explicitly affirm) that the Waki Commission<sup>150</sup> did not constitute an admissibility bar under article 17. During its period of operation, the Commission investigated individual criminal responsibility for the most serious incidents of post-election violence, interviewed witnesses, and published a final report.<sup>151</sup> In these ways, the Commission resembled the non-criminal proceedings in the United States undertaken in response to alleged crimes in Afghanistan. These similarities may suggest that, if the Waki Commission did not even merit consideration as a possible complementarity prob-

<sup>147.</sup> Id. ¶ 82.

<sup>148.</sup> Id.

<sup>149.</sup> Id.

<sup>150.</sup> The Commission of Inquiry into Post Election Violence (CIPEV), commonly known as the Waki Commission, was formed by the Government of Kenya in 2008 to investigate the post-election violence. It was comprised of three members: Justice Philip Waki, a justice serving on Kenya's Court of Appeals; Gavin Alistair MacFayden, former Assistant Commissioner of Police in New Zealand; and Pascal Kambale, a lawyer working with the Open Society Institute's Africa Governance, Monitoring, and Advocacy Project. Int'l Ctr. for Transitional Justice, The Kenyan Commission of Inquiry into Post-Election Violence (2008), available at http://ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf.

<sup>151.</sup> Situation in the Republic of Kenya, Case No. ICC-01/09, Request for Authorization of an Investigation Pursuant to Article 15, ¶¶ 26–27 (Nov. 26, 2009), http://www.icc-cpi.int/iccdocs/doc/doc785972.pdf.

lem, the non-criminal proceedings in the United States could also not pose such a challenge.

However, the Commission's operation differed from the proceedings undertaken in the United States in a critical way: it was followed neither by domestic prosecutions of those investigated nor by a decision by the Republic of Kenya not to prosecute the investigated set of offenders. Is Instead, more analogously to the actions of the DRC in the case involving Germain Katanga, the Commission served as a supportive precursor to future prosecutions in another forum, evidenced most clearly by the Commission's production of a list of alleged high-level perpetrators that was subsequently handed over to the OTP of the Court. Is Just as the DRC's preliminary investigative steps regarding Katanga were incomplete under article 17(1)(b), so too were the Waki Commission's investigations of various perpetrators of the post-election violence in Kenya.

The non-criminal proceedings undertaken by the United States may seem analogous to alternative justice mechanisms such as truth and reconciliation commissions, which were topics of considerable debate during the drafting of the Rome Statute (although they did not achieve special provisions in the final Statute). Many scholars have analyzed such alternative justice mechanisms in detail. However, the non-crim-

<sup>152.</sup> The Kenyan government is currently submitting a complementarity challenge to the Court, indicating among other arguments that it should be free to decide which particular offenders to prosecute. Ruto Admissibility Decision, *supra* note 140, ¶¶ 64–67. However, at the time of the Pre-Trial Chamber's initial ruling on the admissibility of the situation, no such arguments were being made by the Kenyan government. The Appeals Chamber also did not consider these arguments in its rejection of the government of Kenya's appeal. Kenya Admissibility Appeal, *supra* note 143.

<sup>153.</sup> Office of the Prosecutor, Waki Commission List of Names in the Hands of ICC Prosecutor, INT'L CRIMINAL COURT (July 17, 2009), http://www.icc-cpi.int/Menus/Go?id=f625b622-60db-47d0-9a4f-a458897d8354&lan=en-GB.

<sup>154.</sup> Cf. Williams & Schabas, supra note 11, at 617 (discussing the debate at the Rome Conference over the approach to alternative justice mechanisms under article 17(1)(b)).

<sup>155.</sup> See, e.g., Jennifer S. Easterday, Deciding the Fate of Complementarity: A Colombian Case Study, 26 Ariz. J. Int'l & Comp. L. 49 (2009); Gregory S. Gordon, Complementarity and Alternative Justice, 88 Or. L. Rev. 621 (2009); Alexander K. A. Greenawalt, Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court, 50 Va. J. Int'l L. 107 (2009); Olásolo & Carnero Rojo, supra note 23; Darryl Robinson, Serving the Interests of Justice:

inal proceedings undertaken by the United States differ from traditional alternative justice mechanisms in a critical way: selection of these mechanisms does not at the outset preclude subsequent criminal proceedings. The congressional hearings in question neither directly criminally sanctioned the alleged perpetrators nor precluded the possibility of criminal sanction in the future. Instead, these proceedings remained wholly distinct from (as opposed to replacements of) judicial activities. While Inspector General inquiries are not within the criminal justice system, their findings are relevant and available as evidence to DOJ prosecutors, and the Inspectors General have the power to refer cases for DOJ review and potential investigation and prosecution. The OPR inquiry also did not preclude the possibility of criminal proceedings being instigated against Yoo and Bybee.

In comparison, some alternative mechanisms (specifically, pardons or amnesties) do categorically foreclose the possibility of prosecution at the outset. This difference is significant. Article 17(1)(b) protects a state's right not to exercise its criminal jurisdiction over a given case or set of cases, but this protection is not absolute. Article 17(1)(b) contains two distinct elements: an investigation and a decision not to prosecute. Article 17(1)(b) states these elements sequentially, implying that a state must investigate before deciding not to prosecute. This sequence thus requires that a prosecution remain at least possible until the conclusion of the investigations. This sequential reading of article 17(1)(b) also appears to be supported by Darryl Robinson's analysis of traditional alternative justice mechanisms. Robinson contends, "[an] investigation can be broader than [a criminal investigation]" and could include an investigation by a truth commission as long as it retains "a possibility of a criminal prosecution at the end." <sup>156</sup> As long as the possibility of a prosecution remains intact regardless of the choice of a particular investigative mechanism, the state would be required to decide whether or not to pursue criminal pros-

Amnesties, Truth Commissions and the International Criminal Court, 14 Eur. J. Int'l L. 481 (2003); Carsten Stahn, Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court, 3 J. Int'l Crim. Just. 695 (2005).

<sup>156.</sup> Darryl Robinson, Comments on Chapter of Claudia Cárdenas Aravena, in Complementary Views on Complementarity 141, 144 (Jann K. Kleffner & Gerben Kor eds., 2006).

ecution following the conclusion of the investigation. Article 17(1)(b) thus preserves a crucial distinction between the prospect of a trial and the guarantee of a trial.

The drafting history of the Rome Statute further supports a chronological or sequential reading of the two elements of article 17(1)(b). The International Law Commission (ILC) draft and ad hoc committees' commentary on the draft Rome Statute "made clear . . . that the Court was intended to operate in cases where there was no *prospect* of trial in national courts." The Preparatory Commission for the International Criminal Court, 158 in its Draft Article 35, achieved consensus for the proposition that "[t]he Court would not take jurisdiction unless the state with criminal jurisdiction over the offense was unable or unwilling to carry out the investigation or prosecution."159 These drafting materials argue that what is required to render a case inadmissible is the possibility (rather than the fact) of subsequent prosecution by an able and willing state. The drafting history thus suggests that an "investigation" under article 17 cannot at its outset foreclose the possibility of a criminal prosecution, even if the state subsequently decides not to prosecute.

In its Draft Article on Complementarity, the ILC stated that a criminal trial in each particular case was unnecessary, and instead suggested that a case would be inadmissible "when the case has been duly investigated by a state with jurisdiction and the decision not to proceed to a prosecution was apparently well founded."<sup>160</sup> Under this framework, non-criminal investigative proceedings generally should be able to meet the initial requirement of an investigation as long as the proceedings precede the decision not to undertake a criminal prosecu-

<sup>157.</sup> Williams & Schabas, *supra* note 11, at 607 (emphasis added).

<sup>158.</sup> The Preparatory Commission for the International Criminal Court was established by the United Nations and convened by the United Nations Secretary-General to "prepare proposals for practical arrangements for the establishment and coming into operation of the Court." For more information, see *Preparatory Commission for the International Criminal Court*, UNITED NATIONS TREATY COLLECTION, http://untreaty.un.org/cod/icc/prepcomm/prepfra.htm (last visited Nov. 20, 2011).

<sup>159.</sup> Williams & Schabas, supra note 11, at 610.

<sup>160.</sup> Id. at 607.

tion.<sup>161</sup> Whether particular proceedings followed by decisions not to prosecute are sufficient to preclude the Court's action becomes a clearly separate question, hinging not on the non-criminal character of the investigations but instead on whether those investigations reach the set of potential cases likely to come before the Court.

The Court's two-prong complementarity test thus actually appears to contain three prongs: first, the existence of any domestic investigations or prosecutions at all; second, the assessment of whether those proceedings reach the same set of incidents and perpetrators of interest to the Court to qualify as *relevant* state action; and third, only if the first two requirements are satisfied, whether the state conducting relevant proceedings is actually unable or unwilling to do so genuinely.

If article 17(1)(b) requires the domestic investigation to precede the decision not to prosecute, then the choice of an amnesty or truth and reconciliation commission that precludes criminal responsibility at the outset would likely not qualify, as such a choice would essentially foreclose the option of prosecution regardless of the investigation's outcome. In contrast, the evidence produced by the various non-criminal investigations in the United States could have been used as the basis for subsequent criminal prosecutions. And, upon, the completion of the non-criminal investigations, the decision whether or not to initiate criminal prosecutions still needed to be made. The Obama Administration declined to prosecute following the conclusion of these proceedings, thus complying with the required sequence.

All of the aforementioned non-criminal mechanisms undertaken by the United States should thus qualify as investigations under article 17. Each proceeding detailed both the actual crimes (abusive treatment of detainees in U.S. custody) and the active involvement of those responsible in the development and implementation of the abusive techniques. Functionally speaking, these mechanisms investigated the crimes and perpetrators and established a robust evidentiary record

<sup>161.</sup> See Stahn, supra note 155, at 697 ("Article 17(1)(a) and (b) require an investigation, but it does not expressly state that it must be a 'criminal investigation.' The Prosecutor might therefore find that a conditional amnesty with a combined truth and reconciliation procedure satisfies the requirement of an investigation by a state [with jurisdiction].").

that could have provided a basis for subsequent prosecution, had the Obama Administration chosen to initiate one.

## IV. THE REACH OF AN INVESTIGATION UNDER ARTICLE 17

Even if the above non-criminal proceedings qualify as investigations under article 17, they still must satisfy an additional requirement—relevance to the set of potential cases likely to come before the court—to qualify as "state action." <sup>162</sup> The Pre-Trial Chamber contended, "the first step [of the complementarity inquiry] concerns the absence or existence of national proceedings." <sup>163</sup> As analyzed above, the Chamber's language suggests that the mere presence of any domestic proceedings could satisfy the first complementarity prong. However, elsewhere in the same opinion, the Pre-Trial Chamber clarified that the actual test for state action concerned the presence of a narrower set of national proceedings—those directly *relevant to* the set of potential cases likely to come before the Court. <sup>164</sup>

In analyzing the admissibility of the situation in Kenya, the Pre-Trial Chamber focused on whether the domestic proceedings reached "the groups of persons and the crimes allegedly committed during those incidents, which together would likely form the objects of the Court's investigations." <sup>165</sup> By that point, Kenya had commenced a limited number of criminal proceedings against lower-level perpetrators for relatively minor offenses. The Pre-Trial Chamber deemed this set of prosecutions insufficient to render the entire situation in Kenya inadmissible on complementarity grounds specifically because the prosecuted cases would not form the basis of the Court's investigation. <sup>166</sup> Instead, the Chamber found "a situa-

<sup>162.</sup> Ruto Admissibility Decision, *supra* note 140, ¶ 54; *see* Kenya Authorization Decision, *supra* note 5, ¶¶ 184–85, 187 (finding that investigations of only lower-level perpetrators are not sufficient to make the situation inadmissible).

<sup>163.</sup> Kenya Authorization Decision, supra note 5, ¶ 53.

<sup>164.</sup> *Id.* ¶¶ 44, 54.

<sup>165.</sup> Id. ¶ 52.

<sup>166.</sup> Id. ¶¶ 183–85, 187 ("[T]here is a lack of pending national proceedings against 'those bearing the greatest responsibility for the crimes against humanity allegedly committed'. . .[T]here are no domestic proceedings either in the Republic of Kenya or in any third state with respect to the senior leaders related to or associated with the PNU and the ODM.").

tion of inactivity [in Kenya] with respect to the elements that are likely to shape the potential case(s) [of interest to the Court]."167

Within the situation in Afghanistan, the set of potential cases likely to come before the Court will include both the sanctioning, implementation, and enabling of "enhanced interrogation techniques" by the United States government and the infliction of treatment exceeding even the bounds of the approved "enhanced" techniques. The relevant inquiry is therefore whether and to what extent the various U.S. proceedings have reached these potential cases.

As noted earlier in this note, some low-level military perpetrators have been court-martialed by U.S. military courts. <sup>168</sup> However, these proceedings did not address any of the "enhanced interrogation techniques" sanctioned by the Bush Administration (including the use of waterboarding, forced nudity, and prolonged stress positions). Nor did they reach high-level perpetrators in the military, <sup>169</sup> thus leaving the entire group of "persons most responsible" for these crimes untouched. Instead, similarly to the criminal prosecutions in Kenya, these courts-martial focused only on lower-level perpetrators. <sup>170</sup> Therefore, these courts-martial alone cannot preclude the Court's investigation of senior Bush Administration,

<sup>167.</sup> *Id.* ¶ 54 (emphasis added).

<sup>168.</sup> As of 2006, the U.S. military contended that it investigated over 600 claims of detainee abuse. However, Human Rights Watch reported evidence of only 210 investigations, of which only 63 actually reached the court-martial stage and only ten received a sentence of longer than one year. Martin, supra note 46, at 130 n.177 (citing John Sifton, The United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps, 42 HARV. J. ON LEGIS. 487, 489–90 (2006)).

<sup>169.</sup> Civilians cannot be court-martialed except under carefully defined circumstances. Uniform Code of Military Justice, 10 U.S.C. §§ 802, 817 (2006); Griff Witte, *New Law Could Subject Civilians to Military Trial*, Wash. Post, Jan. 15, 2007, at A1.

<sup>170.</sup> For example, dereliction of duty or conduct unbecoming an officer and a gentleman. For more on this point, see Thomas Wayde Pittman & Matthew Heaphy, *Does the US Really Prosecute Its Servicemembers for War Crimes? Implications for Complementarity Before the International Criminal Court,* 21 Leiden J. Int'l L. 165, 173 (2008) ("Use of the Uniform Code of Military Justice's general articles to prosecute war crimes also demeans the nature of such offenses, in that the conduct is ultimately stigmatized not as a war crime, but as the offenses are named: conduct unbecoming an officer and a gentleman.").

agency, and military officials for ordering torture of detainees in Afghanistan.<sup>171</sup>

The non-criminal proceedings, in contrast, investigated both officially sanctioned "enhanced interrogation techniques" and persons most responsible for designing and implementing the techniques as standard interrogation practice. Congressional hearings called a range of witnesses directly involved in the development and implementation of the interrogation techniques, including representatives of higher levels of civilian and military authority. 172 While the hearings did not directly call the highest-level officials involved in the development and implementation of the "enhanced interrogation techniques" (for example, former President Bush and former Vice President Cheney) as witnesses, their records investigated and established in detail the active involvement of those officials in the development, sanction, and implementation of the techniques in question. Many of the investigated officials would likely be implicated by the Court's set of potential cases.

<sup>171.</sup> Moreover, some scholars suggest that courts-martial may be insufficiently independent to preclude ICC action on complementarity grounds. For example, a National Institute of Military Justice commission headed by Walter T. Cox, III argued that "the combined power of the convening authority to determine which charges shall be preferred, the level of court-martial, and the venue where the charges will be tried, coupled with the idea that the same convening authority selects the members of the court-martial to try the cases, is unacceptable in a society that deems due process of law to be the bulwark of a fair justice system." Dickerson, *supra* note 133, at 161 (quoting Walter T. Cox III et al., Nat'l Inst. of Mil. Justice, Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice 8 (2001), *available at* http://www.nimj.com/documents/Cox\_Comm\_Report.pdf).

<sup>172.</sup> For example, the Senate Armed Services Committee Hearing into the Treatment of Detainees in U.S. Custody called the following witnesses: Richard Shiffrin, former Deputy General Counsel for Intelligence, Department of Defense; Lt. Col. Daniel Baumgartner, former Chief of Staff, Joint Personnel Recovery Agency; Jerald Ogrisseg, former Chief, Psychology Services, 336th Training Group, United States Air Force Survival School; LTC Diane Beaver, former Staff Judge Advocate, Joint Task Force 170/JTF Guantanamo Bay; RADM Jane Dalton, former Legal Advisor to the Chairman, Joint Chiefs of Staff; Alberto Mora, former General Counsel, U.S. Navy; William Haynes, former General Counsel, Department of Defense. Treatment of Detainees in U.S. Custody: Hearings before the S. Comm. on Armed Services, 110th Cong. at III (2008).

Inspector General reports within the relevant agencies and departments<sup>173</sup> focused on the actions of persons at all levels within each agency with respect to "enhanced interrogation techniques." In addition, the reports evaluated the collaborations between the agency or department in question and the Bush Administration regarding the techniques. Each report developed a relatively complete picture of the particular agency or department's responsibility—including at the level of senior officials—for the sanction and implementation of the interrogation techniques.<sup>174</sup>

The OLC was intimately involved in the construction and approval of the interrogation methods at issue here. The legal analyses performed by John Yoo and Jay Bybee has been roundly and thoroughly criticized as inadequate at best, and they were withdrawn in 2005. Un-redacted documents reveal persistent collaboration between OLC and the CIA, DOD, and Bush Administration during the development and implementation of the abusive interrogation techniques, and active efforts by Yoo and Bybee to develop strained legal analyses that enabled the implementation of the abusive techniques in the field.<sup>175</sup> The OLC lawyers' designation of techniques such as waterboarding and stress positions as legal<sup>176</sup> was a crucial precursor to the subsequent authorization and infliction of those techniques on detainees in Afghanistan.

Based on the above analysis, the non-criminal proceedings undertaken by the U.S. in response to "enhanced interrogation techniques" reached a significant amount of the conduct and culpable persons that together would comprise the set of potential cases likely to be of interest to the Court. The requirement that domestic investigations reach "groups of per-

<sup>173.</sup> Most specifically, the CIA, FBI, and DOD, among others.

<sup>174.</sup> See, e.g., Central Intelligence Agency, Special Review: Counterterrorism Detention and Interrogation Activities (September 2001–October 2003) (2004), available at http://www.gwu.edu/~nsarchiv/torture\_archive/20040507.pdf; Department of Justice, A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq (2008), available at http://www.justice.gov/oig/special/s0805/final.pdf; Department of Defense, Review of Dod-Directed Investigations of Detainee Abuse (2006), available at http://www.dodig.mil/Ir/reports/ExecSum\_IntelRpt\_082506.pdf.

<sup>175.</sup> See infra notes 72-74 and accompanying text.

<sup>176.</sup> As found in the Classified Bybee Memo, supra note 60.

sons"<sup>177</sup> who would likely be the focus of the Court's investigations suggests the possibility that some individuals within that group could remain uninvestigated. The Pre-Trial Chamber affirmed that the analogous preliminary set of perpetrators cited in situational investigations by the OTP was not strictly binding on future OTP indictments, noting in the context of the situation in Kenya that the OTP was not limited to initiating cases only against individuals within the group of likely perpetrators of post-election violence that it identified in its preliminary submissions regarding complementarity.<sup>178</sup>

The preliminary nature of the situational analysis must accommodate some flexibility in subsequent case selection by the Court as more substantial investigations occur. However, the Court has suggested that state-level investigation of comparable perpetrators, to the absolute exclusion of certain others, may indicate unwillingness to investigate the excluded perpetrators, and may thus not categorically bar Court action with respect to those other perpetrators.<sup>179</sup> Importantly, the Chamber applied this reasoning at a point when the Court had itself selected concrete cases within the situation in Kenya, noting that the Kenyan government had not acted with respect to any of the selected cases. Still, its underlying assumption—arguably also relevant to the situational analysis—is that the existence of only some investigations by a state may indicate unwillingness to investigate other perpetrators, especially when the uninvestigated perpetrators are extremely senior (current or former) state leaders who are deemed to be the persons most responsible for the particular crimes, as was the case in Kenya.

In the context of Afghanistan, the most senior alleged perpetrators of "enhanced interrogation techniques" remain uninvestigated. While the various non-criminal proceedings conducted by the United States in response to the alleged

<sup>177.</sup> Kenya Authorization Decision, *supra* note 5,  $\P$  50.

<sup>178.</sup> Id.

<sup>179.</sup> Ruto Admissibility Decision, *supra* note 140, ¶ 60.

<sup>180.</sup> For example, former President George Bush, former Vice President Dick Cheney, former Secretary of Defense Donald Rumsfeld, former OLC attorneys John Yoo and Jay Bybee, and other relevant officials in the CIA, DOD, Bush Administration, and other agencies who actively contributed to the development and implementation of "enhanced interrogation techniques."

crimes in Afghanistan reached most of the potential cases of interest to the Court, they did not directly investigate former President Bush and former Vice President Cheney. Just as the Republic of Kenya was deemed willing to investigate only some (lower-level) perpetrators of the post-election violence, so too may the United States be deemed willing to investigate only a selection of comparatively lower-level persons (albeit those, like Yoo and Bybee, who were directly and significantly responsible for the implementation of "enhanced interrogation techniques"), thus leaving a portion of the set of cases likely to come before the Court uninvestigated in any direct form.

However, the non-criminal investigations conducted by the United States reached a greater number of high-level perpetrators (for example, senior officials within the CIA and the OLC) than did the set of initial post-election prosecutions in Kenya. These proceedings implicated (even though they did not directly investigate) former President Bush and former Vice President Cheney in the development and sanction of detainee abuse through "enhanced interrogation techniques." Therefore, it does not seem as credible an argument to categorically deem the entire set of proceedings insufficient under article 17 because they did not directly reach a handful of most senior perpetrators. Rather, the absence of those specific proceedings instead seems relevant to the question of genuineness, potentially indicating unwillingness by the United States to directly investigate the highest-level alleged perpetrators.

## V. Indicators of Genuineness

The mere existence of domestic proceedings does not bar parallel Court action unless those proceedings are *genuine*—a term left undefined by the Rome Statute. A decision not to prosecute cannot by itself indicate a lack of genuineness; rather, additional indicators are required. Regarding the situation in Afghanistan, the relevant issue is whether the United States' decisions not to prosecute any high-level offenders following non-criminal investigations can be consid-

<sup>181.</sup> Otherwise, article 17(1)(b), requiring the Court to defer to a genuine decision not to prosecute, would be meaningless.

ered genuine, or whether instead those decisions in fact indicate unwillingness to genuinely proceed.<sup>182</sup>

Article 17(1)(b) requires the Court to defer to a state's decision not to prosecute, unless that decision resulted from unwillingness or inability to prosecute genuinely. The text of this provision indicates that "the term 'genuinely' [further] restricts the class of national proceedings that require deference from the ICC,"183 even beyond the restrictions imposed in the above-detailed complementarity framework. The standard of genuineness thereby gives "the ICC a certain scope to assess the objective quality of a national proceeding."184 Such an assessment necessarily requires the Court to impose its own value judgment on the intentions of the state and the adequacy or appropriateness of the state's proceedings.

The Rome Statute does not directly define the term "genuinely" or provide specific factors relevant to assessing a particular domestic action for genuineness. However, two relevant provisions of the Rome Statute illuminate the likely boundaries of genuine action. First, both article 17(1)(a) and article 17(1)(b) set the concept of genuineness in opposition to the concepts of unwillingness and inability: domestic proceedings can either be genuine, or they can be manifestations of the state's unwillingness or inability to genuinely proceed.<sup>185</sup> The factors suggesting unwillingness thus correspondingly indicate a lack of genuineness.<sup>186</sup> Second, analogously to article

<sup>182.</sup> Only prior actions by the United States are considered in this inquiry. Theoretical willingness to proceed genuinely is irrelevant. *See* Batros, *supra* note 120 (manuscript at 16) ("[The unwilling/unable inquiry] is not a question of whether the state is 'theoretically willing and able to investigate or prosecute the case'. . . . [T]he Court must assess whether the state is willing to genuinely conduct a particular investigation or prosecution which is underway.").

<sup>183.</sup> Informal Expert Paper: The Principle of Complementarity in Practice ¶ 22 (2003), available at http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf.

<sup>184.</sup> Id.

<sup>185.</sup> Rome Statute, *supra* note 2, art. 17(1)(a)–(b).

<sup>186.</sup> Regarding the situation in Afghanistan, it is not a credible argument that the United States is unable to investigate and prosecute genuinely given its functioning criminal justice system. The United States has a functional criminal justice system that is clearly able to accommodate prosecutions of the relevant offenders for crimes committed in Afghanistan. Therefore, the relevant question is whether the selection of entirely non-criminal investigative mechanisms for high-level perpetrators and the subsequent decision not

17(1)(b)'s protection of a genuine decision by a state with jurisdiction not to prosecute, article 53 enables the OTP to decline to prosecute an admissible case if doing so would be "in the interests of justice." In its policy papers, the OTP has elucidated factors relevant to determining whether deference in a particular case would be in the interests of justice, establishing the parameters of a legitimate decision not to prosecute by the Court. These factors appear highly relevant to evaluating the analogous determination of whether a state's decision not to prosecute a particular case can be considered genuine.

Article 17(2) lists factors relevant to determining unwillingness:

The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; [t]here has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; [or] [t]he 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.<sup>189</sup>

If these factors are present in a particular case, it would seem apparent that the proceedings in question would be considered not genuine. Reading article 17(2) literally suggests that any decision not to prosecute an offender may trigger the unwillingness requirement: deciding not to prosecute is effectively a decision that the alleged perpetrator will not be subjected to individual criminal responsibility. However, article 17(1) (b)'s explicit protection of a state's decision not to prose-

to initiate any prosecutions indicates unwillingness on the part of the United States. Therefore, this paper will focus only on the relevant criteria for unwillingness in assessing the genuineness of the proceedings.

<sup>187.</sup> Rome Statute, *supra* note 2, art. 53.

<sup>188.</sup> E.g., Office of the Prosecutor, Policy Paper on the Interests of Justice (2007) [hereinafter Policy Paper on the Interests of Justice], available at http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF 09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf.

<sup>189.</sup> Rome Statute, *supra* note 2, art. 17(2).

cute suggests that additional criteria are required to distinguish permissible from prohibited decisions not to prosecute.

In its policy paper on preliminary examinations, the OTP evaluated the indicia listed in article 17(2) for unwillingness specifically at the situation level. With respect to investigations, the OTP identified relevant criteria as including the following:

the scope of the investigation, and in particular whether the focus is on the most responsible [for] the most serious crimes or [on] marginal perpetrators or minor offenses; manifestly insufficient steps in the investigation or prosecution; deviation from established practices and procedures; ignoring evidence or giving it insufficient weight; intimidation of victims, witnesses, or judicial personnel; irreconcilability of findings with evidence tendered; lack of resources allocated to the proceedings at hand as compared with overall capacities; and refusal to provide information or cooperate with the ICC. 190

The OTP's interpretation of article 17(2) is compatible with the protection of a state's decision not to prosecute in article 17(1)(b). Although the OTP also does not specifically define genuine action, these factors form the boundaries of the concept. These factors imply an assumption by the OTP that genuine action would in fact reach the most serious crimes and most responsible perpetrators, that it would require robust investigations into these crimes, and that the state, if acting genuinely, should invest significant time, resources, and support in the proceedings and take them to their logical conclusion, as warranted by the evidence.

Under article 17(1)(b), both the domestic investigation and the subsequent decision not to prosecute must be genuine. The clearest example of such a genuine decision would be if the investigation simply does not yield sufficient evidence to support a particular prosecution. However, the question becomes more complicated if the evidence is found, but if

<sup>190.</sup> Office of the Prosecutor, Draft Policy Paper on Preliminary Examinations ¶¶ 60–61 (2010) [hereinafter Draft Policy Paper on Preliminary Examinations], available at http://www.icc-cpi.int/NR/rdonlyres/E278 F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP\_Draftpolicypaperon preliminary examinations 04101.pdf.

other considerations are cited to mandate deference. This situation is analogous to the OTP evaluating a case to be admissible but declining to pursue prosecution, which it can only do under the interests of justice framework of article 53.191 A plausible set of standards for evaluating the genuineness of a decision not to prosecute thus can be found in the factors used by the OTP to determine whether it should decline to prosecute in the interests of justice. 192 The concept of the interests of justice was also not defined in the Rome Statute, and the Court itself has not yet issued a formal interpretation of the term. However, the drafting history of the Statute and the subsequent policy papers by the OTP all indicate that the interests of justice was intended to function as a discretionary but clearly countervailing consideration that would allow the OTP to decline to prosecute an otherwise admissible case. 193 If a state's investigation and subsequent decision not to prosecute meets the criteria required for the OTP to defer action under the interests of justice, then such a decision should be considered genuine.

Alternative justice mechanisms were most clearly at the forefront of the interests of justice debates during the drafting of the Rome Statute. A critical criteria emerging from the alternative justice debates was good faith on the part of the state. At the time of the Rome Statute's drafting, two specific (and contrasting) examples of alternative justice mechanisms—the South African Truth and Reconciliation Commission and the Chilean amnesty—were on the minds of the drafters. 194 At the Rome Conference, despite "widespread sympathy for the South African model" and widespread condemnation for the "disgraceful amnesties accorded by South American dictators to themselves," 195 the drafters could not settle on a concrete definition of genuineness that could accommodate the South African model but exclude the Chilean model. 196 Still, the re-

<sup>191.</sup> Rome Statute, *supra* note 2, art. 53; Draft Policy Paper on Preliminary Examinations, *supra* note 190,  $\P$  73.

<sup>192.</sup> It should be noted that the OTP has not yet found a situation or case to merit restraint based on the interests of justice, and thus that the criteria remain uninterpreted.

<sup>193.</sup> Policy Paper on the Interests of Justice, *supra* note 188, at 1.

<sup>194.</sup> Williams & Schabas, supra note 11, at 617.

<sup>195.</sup> Id.

<sup>196.</sup> Id.

spect accorded the South African model by the drafters suggests that it may not have been considered a manifestly insufficient response under article 17. The South African Truth and Reconciliation Commission inquired into individual responsibility for prohibited acts and established an evidentiary record of such culpability.<sup>197</sup> Similarly to the various non-criminal inquiries conducted by the U.S., while the South African Truth and Reconciliation Commission was empowered to (and did) grant amnesty to a significant number of perpetrators, it also preserved the option for individual criminal proceedings against perpetrators who did not comply with pre-established requirements for amnesty. 198 This retention of the prospect of subsequent prosecutions affirms the sequential compliance of the TRC with the end result of article 17(1)(b). This compliance affirms that the investigative mechanism itself was not merely cursory, but that it instead genuinely aimed to investigate the apartheid-related abuses and then recommend corresponding action, whether prosecution or amnesty.

The International Law Commission deliberately selected the term "genuinely" over the term "effectively" to minimize the Court's authority to judge particular aspects of domestic legal systems. <sup>199</sup> The Rome Conference reaffirmed that the Court "was not seeking to undermine or detract from national criminal jurisdiction, but would only assume jurisdiction where a state was unwilling or unable to [investigate and prosecute] in good faith. <sup>200</sup> The selection of the term genuinely over the term effectively argues that the term "genuinely" should be interpreted expansively to preserve significant deference to a state's good faith proceedings.

The Informal Expert Paper on Complementarity, commissioned by the OTP in 2003, establishes another important factor relevant to evaluating the quality of the alternative

<sup>197.</sup> Gordon, *supra* note 155, at 649 ("[T]ruth commissions [involve] . . . the taking of statements, the use of subpoena powers, the use of powers of search and seizure, the holding of public hearings, and the publication of findings of individual responsibility in a final report.").

<sup>198.</sup> For more information on the South African Truth and Reconciliation Commission, see *Truth and Reconciliation Commission*, S. Afr. Dep't of Justice and Constitutional Dev. www.justice.gov.za/trc/ (last visited Nov. 20, 2011).

<sup>199.</sup> Informal Expert Paper, supra note 183, at n.9.

<sup>200.</sup> Williams & Schabas, supra note 11, at 611.

mechanisms under the interests of justice rubric as the "severity of circumstances of necessity justifying departure." The OTP implied the existence of a similar necessity requirement to justify a decision not to prosecute at all, affirming that "in light of the mandate of the [OTP] and the purposes of the Statute, there is a strong presumption that investigations and prosecutions *will* be in the interests of justice" whenever "the criteria established in article 53(1)(a) and (b) or article 52(a) and (b) [the jurisdictional and admissibility criteria for initiating an investigation] are met." Analogously, a state mounting a complementarity challenge under article 17(1)(b) could plausibly be required to justify its decision not to prosecute, if that decision was not made based on a lack of supporting evidence.

Based on criteria guiding the interests of justice determination, the non-criminal proceedings conducted by the United States in response to crimes committed in Afghanistan do not mandate restraint under the interests of justice rubric. Rather, they indicate that the United States is unwilling to prosecute the relevant set of high-level perpetrators. The initial choice of non-criminal investigative mechanisms for all high-level alleged perpetrators may well have been a reflection of the highly politically charged nature of the investigations and an attempt to build a clear evidentiary baseline before taking further action. However, the U.S. federal criminal code expressly contemplates criminal responsibility (including for high-level officials) for torture.<sup>204</sup> This statute certainly contemplated the charged political consequences of such prosecutions; however, it contains no exception for the political position of the offender.

While article 17(1)(b) ensures that at least some decisions not to prosecute may be genuine, the Court's strong preference for prosecutions argues strongly that its own decision to defer under the interests of justice framework must be justified, and indeed the OTP is required to submit that decision

<sup>201.</sup> Informal Expert Paper, *supra* note 183, ¶ 73.

<sup>202.</sup> Draft Policy Paper on Preliminary Examinations, supra note 190, ¶ 75.

<sup>203.</sup> Policy Paper on the Interests of Justice, supra note 188, at 1.

<sup>204. 18</sup> U.S.C. § 2340A (2006).

to the Court for its review.<sup>205</sup> The OTP describes deference under the interests of justice as "a potential countervailing consideration that may produce a reason not to proceed."<sup>206</sup> The interests of justice is thus a rare exception rather than an option co-equal to criminal prosecution, and it is likely that a decision not to prosecute under article 17(1)(b) would be analyzed against the same rigorous standard for genuineness.

Regarding the U.S. proceedings, genuineness challenges arise in the choice of the particular non-criminal mechanisms themselves, which was a choice to effectively exempt the cases from the American criminal justice system. Court-martial proceedings did not initiate any cases prosecuting the implementation or sanction of "enhanced interrogation techniques." The only non-criminal mechanism retaining direct sanctioning authority of any kind—the OPR investigation into the OLC lawyers—had its recommendation for sanctions overruled because of procedural flaws.<sup>207</sup> Associate Deputy Attorney General David Margolis overruled the OPR's findings, 208 objecting not to the analysis of the particular conduct in question, but instead to the OPR's failure to identify in advance "a known, unambiguous obligation or standard to [apply to] the attorney's conduct."209 This decision may argue in favor of strong procedural protections within the OPR investigative mechanism. However, it also raises concerns about whether Margolis' ability to categorically cut off any possibility of sanction—regardless of recommendations made or evidence found—enables the effective shielding of the alleged perpetrators from criminal responsibility in violation of the U.S. federal criminal prohibition of torture.<sup>210</sup> The Obama Administration's declination to initiate any criminal proceedings at all with respect to the relevant cases thus departs not only from the preferences toward prosecution of the Court but also from the strong interests of the United States—expressed through the federal criminal prohibition on torture in addition to

<sup>205.</sup> Draft Policy Paper on Preliminary Examinations, supra note 190, ¶ 73.

<sup>206.</sup> Policy Paper on the Interests of Justice, supra note 188, at 1; Draft Policy Paper on Preliminary Examinations, supra note 190, ¶ 73.

<sup>207.</sup> Margolis Memo, supra note 117, at 2.

<sup>208.</sup> Id.

<sup>209.</sup> Id.

<sup>210. 18</sup> U.S.C. §§ 2340, 2340A (2006).

binding international prohibitions—in suppressing and prosecuting torture.

The most clearly genuine explanation of a decision not to initiate prosecutions is an absence or inadequacy of incriminating evidence following a vigorous and thorough investigation. However, this explanation does not apply to the situation in Afghanistan, as the various American investigations conducted to date have already unearthed a significant amount of evidence demonstrating direct culpability of senior government officials in the authorization of torture, inhuman treatment, and outrages upon personal dignity in the form of "enhanced interrogation techniques." The Obama Administration affirmed that at least some of these techniques—specifically, waterboarding—constituted torture and were therefore illegal.<sup>211</sup> While the Court's early commissioned papers interpreting Rome Statute provisions suggested that a showing of necessity may justify a decision not to bring a case before the Court in the interests of justice,<sup>212</sup> the United States has not even attempted to make any such showing, and it is moreover highly unlikely that it could make that showing credibly. If the United States did prosecute any of the cases detailed above, such prosecutions would almost certainly be extremely politically contentious and result in significant domestic discord. Yet, avoiding political controversy has not been cited either by the Court or by the OTP as a plausible (or genuine) justification for a decision not to prosecute.

In sum, the decision not to initiate any criminal proceedings at all (either investigative or prosecutorial) for "enhanced interrogation techniques" clearly appears to be a manifestly insufficient response to very serious allegations of an institutionalized policy of torture perpetrated at the highest levels of the U.S. government. The non-criminal investigations (Inspector General reports, the DOJ OPR inquiry, and Congressional hearings) detailed the direct and active complicity at the highest echelons of government in the design and implementation

<sup>211.</sup> Ewen MacAskill, Obama: I believe waterboarding was torture, and it was a mistake, The Guardian, Apr. 29, 2009, http://www.guardian.co.uk/world/2009/apr/30/obama-waterboarding-mistake; Carrie Johnson, Waterboarding Is Torture, Holder Tells Senators, Wash. Post, Jan. 16, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/01/15/AR2009011500267. html.

<sup>212.</sup> Informal Expert Paper, supra note 183, ¶ 73.

of "enhanced interrogation techniques." At a minimum, these findings raised strong inferences of government culpability under the doctrine of command responsibility for the consequent erosion of any protections for detainees and the infliction of abuse exceeding the bounds of "enhanced interrogation techniques." The Obama Administration's subsequent decisions not to initiate prosecutions for these offenses despite the significant inculpatory evidence effectively shielded the most senior (and most responsible) perpetrators from criminal responsibility.

## VI. CONCLUSION

Were U.S. nationals ever to be at risk of prosecution by the Court for alleged crimes committed in Afghanistan,<sup>213</sup> the United States would likely argue that the relevant Congressional hearings, Inspector General investigations, and Office of Professional Responsibility inquiry, followed by the Obama Administration's decision not to criminally prosecute any investigated offenders, all bar parallel Court action on complementarity grounds.<sup>214</sup> Such an admissibility challenge would force the Court to decide whether investigative mechanisms outside of the American criminal justice system followed by decisions not to prosecute any investigated perpetrators, despite significant evidence indicating culpability, meet the requirements set forth in article 17(1)(b).

Neither article 17 nor the Court's jurisprudence expressly precludes all non-criminal inquiries from qualifying as investigations under the Rome Statute. Article 17(1)(b) does not define or limit the type of investigation required other than requiring genuineness. Therefore, any argument that only crim-

<sup>213.</sup> This would most likely occur if the OTP initiated a formal investigation into the situation in Afghanistan under article 15 of the Rome Statute. It is less likely that Afghanistan will refer the situation to the Court, and virtually impossible (given the United States' veto power) that the Security Council will refer the situation under Chapter VII.

<sup>214.</sup> This would be a much stronger argument than the largely discredited legal argument that the Rome Statute requires an active nationality base of jurisdiction for crimes committed on the territory of a state party. For a discussion of the ability of the Court to investigate and prosecute nationals of states not parties to the Rome Statute, see Dapo Akande, *The Jurisdiction of the International Criminal Court Over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. Int'l Crim. Just. 618 (2003).

inal investigations qualify requires a justification of why such a limit should be read into the provision. Perhaps the most obvious justification is that a criminal investigation can directly lead to a subsequent criminal prosecution. However, article 17(1)(b) does not require domestic criminal prosecution to preclude the Court's action; rather, a state is equally free to investigate and decide not to prosecute. A criminal investigation evaluates conduct and intent in relation to existing criminal laws to evaluate whether prosecution is warranted. However, the various non-criminal mechanisms employed by the U.S. government undertook similar processes and produced detailed evidence about both incidents and perpetrators going up the chain of command, thus providing useful information for a possible future criminal prosecution.

At the situation level, the Court appears to compress two distinct elements into the first prong of its complementarity inquiry (the presence of state action): completeness, or the presence of investigations followed either by prosecutions or by decisions not to prosecute; and relevance, requiring the domestic proceedings to overlap with the set of potential cases likely to form the basis of the Court's investigation. Only after the first two elements of state action are met does the Court evaluate the relevant domestic proceedings for genuineness.

Reading an implicit requirement into article 17 that all investigations must be criminal is moreover unnecessary to enable the Court to act in the face of domestic tolerance for impunity. Article 17(1)(b)'s explicit requirement of genuineness sufficiently guards against state-sanctioned impunity and preserves the right of the Court to act in the face of domestic unwillingness or sham proceedings. While genuineness is not defined in the Rome Statute, other provisions in the statute and interpretations by the Court and the OTP provide useful guidance. First, article 17(1)(b) sets the requirement of genuineness in opposition to domestic unwillingness. Therefore, the presence of factors indicating unwillingness with respect to particular proceedings indicate a lack of genuineness. Second, the analogous authority of the OTP to decline to prosecute following an investigation if restraint would be in the interests of justice suggests a framework under which to evaluate a state's decision under article 17(1)(b). Applying this framework to decisions not to prosecute enables the Court to identify and distinguish genuine proceedings.

Based on the above analysis, the various non-criminal inquiries undertaken by the United States should qualify as investigations based on a functional definition of the term. However, the limited reach of these investigations (not directly investigating the most senior members of the Bush Administration) casts doubt about whether they are sufficiently relevant to the set of potential cases before the Court, especially considering the Court's often-repeated preference for prosecuting persons most responsible.<sup>215</sup> Moreover, the choice of such non-criminal mechanisms for every senior official investigated and the infliction of criminal-like (military) sanctions only on the lowest-level perpetrators<sup>216</sup> raises strong inferences of the intent to shield the most responsible alleged perpetrators from the American criminal justice system. The subsequent declination by the Obama Administration to prosecute any cases involving "enhanced interrogation techniques" appears irreconcilable with the significant amount of evidence of senior Bush Administration involvement in torture and thus further supports such inferences,<sup>217</sup> especially in light of federal criminal prohibitions of such conduct.<sup>218</sup>

The Rome Statute explicitly disclaims any relevance of official capacity and instead affirms, "in particular, official capacity as Head of State or Government . . . shall in no case exempt a person from criminal responsibility under this Statute." Other major international prohibitions on torture, including Common Article 3 of the Geneva Conventions, and the Convention Against Torture, as well as the U.S. Torture Statute, all affirm that political position or status provides no excuse or defense. Therefore, the decision not to prosecute any highlevel officials for the alleged crimes cannot be driven by the fact that the officials were former heads of the U.S. government, even though such prosecutions would cause significant political upheaval. Rather, based on the above complementar-

<sup>215.</sup> See, e.g., PROSECUTORIAL STRATEGY 2009–2012, supra note 41, ¶ 14 (noting that the Office of the Prosecutor will prosecute "those situated at the highest echelons of responsibility, including those who ordered, financed, or organized the alleged crimes").

<sup>216.</sup> A small number of whom were court-martialed. See supra note 168.

<sup>217.</sup> Draft Policy Paper on Preliminary Examinations, supra note 190, ¶¶ 60–61.

<sup>218. 18</sup> U.S.C. § 2340A (2006).

<sup>219.</sup> Rome Statute, *supra* note 2, art. 27(1).

ity analysis, the OTP would be acting well within the scope of its authority to bring forward an application to investigate the situation in Afghanistan. Guided by its statutory mandate to prevent impunity for the most serious international crimes, <sup>220</sup> the Court can and should act in response.

<sup>220.</sup> Id. pmbl.