The International Criminal Court Prosecutor's preliminary examination on Afghanistan and possible impacts on accountability for secret detention and rendition

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I. Introduction

This chapter considers the International Criminal Court (ICC) Prosecutor's ongoing preliminary examination into the situation in Afghanistan and explores the myriad issues relating to the potential exercise of jurisdiction by the ICC over crimes connected to secret detention and rendition in the context of the USA's High Value detainee programme. In particular, the chapter examines the conditions for the exercise of jurisdiction by the ICC and explores how the findings of domestic and regional courts, commissions of inquiry, treaty bodies and other mechanisms may impact on whether the ICC exercises jurisdiction. The article also considers the current scope of the Afghanistan examination and the connections with crimes committed on the territories of European States Parties - Poland, Lithuania and Romania. It also explores the possibility of pursuing a case against USA citizens for acts carried out on the territory of Afghanistan or another State Party.

The chapter commences with an explanation of the jurisdiction of the ICC and how decisions to open and progress preliminary examinations are taken and the criteria used thus far in other cases to evolve a preliminary examination into a full-fledged investigation before the Court. It analyses the stage of the examination in relation to Afghanistan and explores how information generated from other proceedings may be useful to the Prosecutor in determining whether and if so how to progress the examination and the factors that may be taken into account when deciding to turn the examination into a full investigation.

The possibility for the ICC to exercise criminal jurisdiction over the acts in question serves as an important stop gap against the near total impunity that has characterised the high value detainee programme. Nonetheless, it is also important that there is an adequate acceptance of state responsibility; the actions took place in accordance with government policy – both the USA as the initiator of the policy but also the many governments who consciously decided to support and/or

acquiesce in the policy by allowing their territories to be used for the purposes of hosting secret sites of detention and unlawfully detaining persons at those sites, sometimes for extended periods of time and often where they were subjected to torture and ill-treatment. To date, and as explored in other chapters in this book, there has been a near total failure of governments to accept responsibility. It is hoped that the ICC preliminary examination and possible subsequent phases can serve as a catalyst to break that pattern.

II. Relevant jurisdictional provisions

The ICC may exercise jurisdiction over acts of genocide, crimes against humanity or war crimes that were committed on or after 1 July 2002 when those crimes were committed by: a national of a State Party, in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court for the purposes of a particular situation. It may also exercise jurisdiction when the crimes were referred to the ICC Prosecutor by the UN Security Council pursuant to a resolution adopted under chapter VII of the UN charter.[1]

In those instances in which the ICC may exercise jurisdiction, a matter will only proceed before the ICC if the competent State is unwilling or unable to investigate or prosecute the case genuinely. In addition, a case must be of sufficient gravity to justify further action by the Court.[2] Furthermore, the Prosecutor may decide not to proceed with an investigation or prosecution where it is determined that to proceed would not serve the interests of justice and of the victims.[3]

When the Prosecutor receives information about alleged crimes falling under the jurisdiction of the Court, if may conduct a preliminary examination to decide whether there is a reasonable basis to initiate an investigation. During this process, it will assess whether the relevant jurisdictional, admissibility and complementarity criteria referred to above, appear to be met.

Over time, the Prosecutor has developed a phased approach to its preliminary examinations. In Phase 1, an initial assessment will be carried out on the information received to filter out information that concerns crimes that are clearly outside the jurisdiction of the Court. In Phase 2,

[1] ICC Statute, Articles 5, 11-13.
[2] Ibid, Article 17.
[3] Ibid, Article 53, paragraph 1 (c) and 2 (c).

the Prosecutor will analyse the information on alleged crimes to determine whether the alleged crimes fall under the subject matter jurisdiction of the Court. In Phase 3 it analyses the admissibility criteria of complementarity and gravity and in Phase 4 it examines the interests of justice.[4]

There are no timelines in the Statute for preliminary examinations to pass through the different phases and either for the examination to be shelved or for it to be progressed to a full investigation. Depending on the facts and circumstances of each situation, the Prosecutor may decide either to: (i) decline to initiate an investigation; (ii) continue to collect information on crimes and relevant national proceedings in order to make a determination; or (iii) initiate the investigation, subject to judicial authorisation as appropriate. In principle, matters may and in practice have remained within the preliminary examination phase for an extended period of time. The Afghanistan preliminary examination has been going on for at least ten years. While the ICC is bound to respect general provisions relating to human rights,[5] and this in principle would include the right to an effective (including speedy) investigation, so far the Court has shown only limited willingness to inquire about the Prosecutor's progress with an examination,[6] and it has been difficult for the victims of the alleged crimes to have access to the judicial process during the examination phase to encourage the Court to press the Prosecutor to show some progress.

III. History of the preliminary examination

Afghanistan ratified the ICC Statute on 10 February 2003. The ICC therefore has jurisdiction over crimes under the ICC Statute committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards.[7]

The Prosecutor made public the preliminary examination in 2007, and the activities of the Prosecutor pursuant to the examination were first summarised in a public report on preliminary

[4] This approach was first articulated in OTP, 'Report on Preliminary Examination Activities 2012', November 2012, para. 16 and was explained in further detail in OTP, 'Policy Paper on Preliminary Examinations', November 2013, paras. 77-84.
[5] ICC Statute, Article 21(3).
[6] See, the atypical decision of the Pre-Trial Chamber to press the Prosecutor for a timeframe in the preliminary examination regarding the Central African Republic, and the Prosecutor's response: Pre-Trial Chamber, 'Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic', Situation in the Central African Republic, ICC-01/05-6, 30 November 2006, p. 4; OTP, 'Prosecution's Report Pursuant to Pre-Trial Chamber Ill's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic', ICC-01/05-7, 15 December 2006, para. 11.
[7] ICC Statute, Article 126(2).

examinations issued in 2011,[8] and annual progress reports on preliminary examinations have been issued ever since. In the 2011 report, the focus of the examination was limited to assessing the subject matter jurisdiction of the Court (Phase 2). The crimes which the Prosecutor indicated were under examination included killings by Afghan insurgent groups, civilian deaths by pro-government forces, acts of torture or other cruel, inhuman or degrading treatment against detainees by 'various parties to the conflict', attacks on humanitarian targets and protected objects, and the recruitment of child soldiers.[9] Thus, there was only oblique reference to possible crimes committed by foreign forces operating in Afghanistan at the time of the issuance of the 2011 report. In the 2012 report this changes. The Prosecutor refers in the contextual analysis to the role of ISAF and US forces, as well as the Government of Afghanistan forces, in combatting armed groups,[10] and notes that '[p]ersons in the custody of the Afghan authorities and/or international military forces have allegedly been subject to possibly abusive interrogation techniques. In March 2012, the Afghanistan Independent Human Rights Commission documented instances of abuse in nine National Directorate of Security (NDS) facilities.'[11] The Prosecutor further noted problems with access to information, indicating that '[s]everal requests for information sent by the Office in the past two years to various States, including the Government of Afghanistan and States with troops in Afghanistan, have been dismissed or remain pending.'[12]

In the 2013 report, the Prosecutor explains progress with the subject matter analysis and notes that there is a reasonable basis to believe that crimes coming within the jurisdiction of the Court were committed in the context of the Afghanistan situation. The Prosecutor makes these findings in respect of Afghan insurgents and, to a lesser extent, Afghan and 'other' government forces.[13] With respect to foreign troops, the report refers to allegations that between 2002 and 2006, some of the detainees captured in Afghanistan were subjected to interrogation techniques which may constitute torture or inhumane treatment. It is alleged in the report that such interrogation techniques were applied in combination, either simultaneously or consecutively. However, the Prosecutor is careful to contain the analysis. First, the Prosecutor makes clear that her office is not yet capable of

[8] OTP, 'Report on Preliminary Examination Activities', 13 December 2011.
[9] Ibid, paras. 24-29.
[10] OTP, Report on Preliminary Examination Activities 2012', 22 November 2012, para. 22.
[11] Ibid, para. 28.
[12] Ibid para. 37.
[13] OTP, 'Report on Preliminary Examination Activities 2013', 25 November 2013, paras. 40 and 4-44.

determining whether there is any reasonable basis to believe any such alleged acts, which could amount to torture or humiliating and degrading treatment, may have been committed as part of a policy.[14] Thus, the subject matter examination is not exhausted fully. Further, the 2013 report indicates that '[i]n relation to allegations of torture and ill-treatment, the OTP has focused on cases of those detainees captured in the context of the armed conflict in Afghanistan, and, short of a sufficient nexus to the latter, does not include other alleged conduct related to the treatment of detainees captured outside of Afghanistan.'[15] Here, the Prosecutor appears to be taking a cautious and somewhat ring-fenced approach to its factual analysis.

This evolves further in the 2014 report, where the Prosecutor for the first time indicates that:

> the alleged torture or ill-treatment of conflict-related detainees by US armed forces in Afghanistan in the period 2003-2008 forms another potential case identified by the Office. In accordance with the Presidential Directive of 7 February 2002, Taliban detainees were denied the status of prisoner of war under article 4 of the Third Geneva Convention but were required to be treated humanely. In this context, the information available suggests that between May 2003 and June 2004, members of the US military in Afghanistan used so-called "enhanced interrogation techniques" against conflict-related detainees in an effort to improve the level of actionable intelligence obtained from interrogations. The development and implementation of such techniques is documented *inter alia* in declassified US Government documents released to the public, including Department of Defense reports as well as the US Senate Armed Services Committee's inquiry. These reports describe interrogation techniques approved for use as including food deprivation, deprivation of clothing, environmental manipulation, sleep adjustment, use of individual fears, use of stress positions, sensory deprivation (deprivation of light and sound), and sensory overstimulation.[16]

[14] Ibid, para. 51. Article 8(1) of the ICC Statute specifies that 'The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'.
[15] Ibid, para. 50.
[16] OTP, 'Report on Preliminary Examination Activities 2014', 2 December 2014, para. 94.

Also in 2014, the Prosecutor notes that her office has begun to analyse 'the relevance and genuineness of national proceedings by the competent national authorities for the alleged conduct described above as well as the gravity of the alleged crimes.'[17] Thus, this takes the Prosecutor's examination to Phase 3. In the 2015 report, in respect of complementarity, the Prosecutor makes a number of comments about the lack of indictments and prosecutions of US forces and the resort to disciplinary proceedings to sanction certain personnel;[18] however, no findings or conclusions are taken as to the willingness or ability of the USA authorities to carry out genuine investigations and/or prosecutions. In relation to the gravity assessment, the Prosecutor notes the significant and cumulative impact of enhanced interrogation techniques on the victims but refrains from making a clear finding as to whether the necessary threshold for gravity has been attained.

From 2011 until 2015, the focus of the Prosecutor's preliminary examination is on Afghan insurgents, Afghan forces and other pro-government forces. Progressively, the emphasis of the subject matter examination on USA government forces has centred on torture or humiliating and degrading treatment, including "enhanced interrogation techniques."

In 2016, a new dimension is added. In the November 2016 report on preliminary examinations, the Prosecutor notes that there is a reasonable basis to believe that, at a minimum, the following crimes within the Court's jurisdiction have occurred '… War crimes of torture and related ill-treatment, by US military forces deployed to Afghanistan and in secret detention facilities operated by the Central Intelligence Agency, principally in the 2003-2004 period, although allegedly continuing in some cases until 2014 .'[19] For the first time, the Prosecutor reveals a focus on secret detention facilities operated by the CIA, referring specifically to those operating in other States Parties, notably Poland, Romania and Lithuania; a 'limited number of alleged crimes associated with the Afghan armed conflict are alleged to have been committed on the territories of Poland, Lithuania and Romania, which are parties to the Statute. This is because individuals captured in the context of the armed conflict in Afghanistan, such as presumed members of the Taliban or Al Qaeda, were allegedly transferred to detention centres located in those countries.'[20]

[17] Ibid, para. 96.
[18] OTP, 'Report on Preliminary Examination Activities 2015', 12 November 2015, paras. 128, 129.
[19] OTP, 'Report on Preliminary Examination Activities 2016', 14 November 2016, para. 198 (c).
[20] Ibid, para. 199.

In the 2016 report, the Prosecutor goes further, indicating that potential cases have been identified that would be admissible under the Statute, 'subject to further information that could be provided by the relevant national authorities in the course of the preliminary examination or any subsequent investigation.'[21] In this sense, the Prosecutor is intimating that she is ready to proceed to a full investigation, unless she receives compelling information from States as to why she should not. Arguably, the only information that might satisfy the Prosecutor at this stage is clear and cogent evidence that the relevant States Parties have demonstrated a renewed willingness to investigate and prosecute. As detailed in other chapters in this volume, evidence of a genuine willingness to investigate and prosecute is not likely to be forthcoming, at least having regard to the willingness shown to date. But, this might change when the Prosecutor makes more tangible the case – the prospect of ICC investigations and prosecutions might prove to be the necessary incentive to spur reluctant states to action. Thus, onward the Prosecutor should go.

IV. The Subject-Matter Analysis: Crimes of extraordinary rendition as crimes under the Rome Statute

Extraordinary rendition is a complex concept involving the extra-legal and normally secret apprehension and transfer of persons from one jurisdiction to another for the purposes of detention and interrogation using techniques that can amount to torture. It comprises multiple actions by multiple actors. In the post 11 September 2001 context, the persons subjected to this treatment had next to no information about where they were taken, no access to the outside world, no way to challenge the legality of their detention or transfer, and were literally kept in a state of limbo. Typically, the persons were captured and handed over to the CIA, then rendered to and couriered between several CIA "black sites" including those in operation in Afghanistan, where they were detained, subjected to a variety of "enhanced interrogation techniques" capable of amounting to torture, with some eventually bundled off to the detention facility at Guantanamo Bay, Cuba.[22] The European Court of Human Rights has described that:

> The CIA documents give a precise description of the treatment to which High Value Detainees were being subjected in custody as a matter of precisely applied and predictable

[21] Ibid, para. 214.
[22] See generally, USA Senate Select Committee on Intelligence (SSCI), 'Committee Study of the CIA's Detention and Interrogation Program', approved on 13 December 2012 and released in heavily redacted form on 9 December 2014.

> routine, starting from their capture through rendition and reception at the black site, to their interrogations. As stated in the 2004 CIA Background Paper, "regardless of their previous environment and experiences, once a [High-Value Detainee] is turned over to the CIA a predictable set of events occur". …All the measures were applied in a premeditated and organised manner, on the basis of a formalised, clinical procedure, setting out a "wide range of legally sanctioned techniques" and specifically designed to elicit information or confessions or to obtain intelligence from captured terrorist suspects. Those – explicitly declared – aims were, most notably, "to psychologically 'dislocate' the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist ... efforts to obtain critical intelligence"; "to persuade High-Value Detainees to provide threat information and terrorist intelligence in a timely manner"; "to create a state of learned helplessness and dependence"; and their underlying concept was "using both physical and psychological pressures in a comprehensive, systematic and cumulative manner to influence [a High-Value Detainee's] behaviour, to overcome a detainee's resistance posture" …[23]

There is no uniformly accepted definition of extraordinary rendition nor does it feature as a crime under the Rome Statute nor is it listed specifically in the elements of crimes for war crimes, genocide or crimes against humanity. However many of its component parts -- abduction, enforced disappearance, deprivation of liberty, deportation and population transfer, torture and outrages upon personal dignity -- feature variously under the headings of crimes against humanity and war crimes.[24]

The entry point for the ICC Prosecutor's examination of extraordinary rendition is thus through the examination of one or several of the component parts of extraordinary rendition. In the 2016 preliminary examinations report, the Prosecutor's focus is on the results of the rendition – the war crimes of torture, cruel treatment, outrages upon personal dignity perpetrated by members of US armed forces on the territory of Afghanistan, and torture, cruel treatment, outrages upon personal

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[23] ECtHR, *Al Nashiri v Poland* (2014), App. No. 28761/11, 24 July 2014, paras. 512-515.

[24] In respect of war crimes not of an international character see, ICC Statute, Articles 8(2)(c)(i)-(iv) and (e)(vi) and (ix). In respect of crimes against humanity, see, Article 7(1)(d), (e), (f), (g), (h), (i), (k). The ICC Statute defines enforced disappearance as 'the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.' [Art 7(2)(i)].

dignity and/or rape by members of the CIA on the territory of Afghanistan and additional countries (Poland, Romania, Lithuania).[25] There is less emphasis on abduction, transfer and disappearance between jurisdictions even though such practices 'actually increased the detainees' feelings of futility and helplessness, making them more vulnerable to the methods of ill-treatment… these transfers increased the vulnerability… to their interrogation, and was performed in a manner (goggles, earmuffs, use of diapers, strapped to stretchers, sometimes rough handling) that was intrusive and humiliating…'[26] The focus appears to be on the cruel acts which took place on specific territories.

The ICC Prosecutor's focus on war crimes is possible because the overall lens of the preliminary examination is the situation in Afghanistan which the Prosecutor understands as being characterised as an armed conflict of a non-international character.[27] The war crimes focus is important, as it helps to debunk the self-serving suggestion that Common Article 3 of the Geneva Conventions, requiring humane treatment of individuals in a conflict, did not apply to al-Qa'ida and Taliban detainees,[28] because they were 'unlawful combatants'.[29] However, having regard to the dynamics of extraordinary rendition as practised as a policy of the US government vis-à-vis high value detainees by members of the CIA and as supported by various governments, this focus on Afghanistan and on war crimes is restrictive as the requirement for a nexus with Afghanistan will inevitably cover only a portion of the web of conduct associated with extraordinary rendition.

In theory, it would also be possible for the ICC Prosecutor to examine the conduct of extraordinary rendition through the lens of crimes against humanity perpetrated by nationals of States Parties and/or on the territory of other States Parties – e.g, Poland, Romania and Lithuania, and potentially others. Many of the constitutive elements of the underlying acts of crimes against humanity would

[25] These acts are punishable under articles 8(2)(c)(i) and (ii) and 8(2)(e)(vi) of the Statute.
[26] ICRC. 'ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody', WAS/07/76. 14 February 2007, p. 7.
[27] OTP, 'Report on Preliminary Examination Activities 2016', 14 November 2016, para. 197.
[28] President George W. Bush, 'Humane Treatment of al Qaeda and Taliban Detainees,' Memorandum to the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff, 7 February 2002, p. 2: 'I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees…. Of course, our values as a Nation, values that we share with many nations in the world, call for use to treat detainees humanely, including those who are not legally entitled to such treatment.'
[29] While this debate was principally resolved with the adoption by the US Supreme Court of its decision in the *Hamdan* case, the notion that terror suspects are outside of the framework of any law has continued to infect some parts of political discourse. See, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795-96 (2006). See also, the revised 2007 memo which purported to revise the permissible interrogation techniques to comply with the *Hamdan* decision: Executive Order 13440, 'Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency', 20 July 2007.

appear to be present, such as forcible population transfer, torture and enforced disappearance of persons. The general requirements for a crime against humanity would also appear to be satisfied: the acts must have been committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[30] These alleged crimes were not simply the abuses carried out by a few isolated individuals. Rather, they appear to have been committed against numerous persons,[31] as part of approved interrogation techniques[32] in an attempt to extract "actionable intelligence" from detainees.[33] The European Parliament concluded that there exists a 'widespread, methodical practice of extraordinary rendition following precise rules carried out by certain U.S. secret services.'[34]

V. Complementarity

The ICC will only have jurisdiction if the competent national authorities have failed to investigate or prosecute the matter itself.[35] In order for a case to be inadmissible before the ICC, there must be State investigations and/or prosecutions into a case that is substantially the same as the one before the Prosecutor and these must be genuine. Investigations must be full and capable of leading to the conviction and punishment of the persons concerns. Similarly, any national decision not to proceed with an investigation or prosecution must be genuine; it must not have resulted from the unwillingness or inability of the State genuinely to carry out the prosecution. If the matter has already been prosecuted at the domestic level, this will typically prevent the Prosecutor from entertaining a fresh prosecution, unless that domestic prosecution was a sham prosecution.

In the ICC's jurisprudence, it is made clear that the ICC will have jurisdiction to pursue a case when there is no active national investigation or prosecution.[36] In order for the ICC to decline

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[30] ICC Statute, Article 7(1).
[31] The SSCI report refers to 119 C IA detainees, See, USA Senate Select Committee on Intelligence (SSCI), 'Committee Study of the CIA's Detention and Interrogation Program', 'Executive Summary', p. 14. See also, Parliamentary Assembly Council of Europe (PACE), Committee on Legal Affairs and Human Rights (CLAHR), 'Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States: Second Report', 11 June 2007, para. 55.
[32] Jay Bybee, Office of Legal Counsel, Department of Justice, 'Memo for Alberto Gonzales, Counsel to the President Re: Standards of Conduct for Interrogation under 18 USC §§2340-2340A', 1 August 2002; Jay Bybee, Office of Legal Counsel, Department of Justice, 'Memo for John Rizzo, Acting General Counsel to the CIA: Interrogation of an Al Qaeda Operative', 1 August 2002.
[33] Emmerson 2013 report
[34] Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, Eur. Parl. Doc. PE 380.593v04-00 4 (2006). The report of the European Parliament, which deplores the passivity of some Member States as well as the lack of co-operation from the EU Council of Ministers, was approved by a vote of 382-256, with 74 abstentions. The final report, dated Jan. 30, 2007, can be found at Eur. Parl. Doc. PE 382.246v02-00 (A6-0020/2007).
[35] ICC Statute, Article 17.
[36] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, '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' ICC-01/04-01/07-1497, 25 September 2009, para. 78.

jurisdiction on the basis that there is a national investigation or prosecution, it is not enough for a State or other party to assert that proceedings are ongoing. It must be shown with "evidence of a sufficient degree of specificity and probative value" that there is indeed an investigation.[37] There is a need to show that 'concrete, tangible and progressive steps' are being taken with the national investigation or prosecution, for the ICC to desist.[38]

V.1 Members of the USA armed forces and CIA

There is no case before the ICC against which it can be assessed whether there is a genuine investigation or prosecution into allegations which concern a particular person of interest to the ICC and for substantially the same conduct. However, there is a lot that can be said about the general approach taken by the USA Government to investigations and prosecutions concerning secret detention and rendition. These types of factors will impact on the Prosecutor's initial consideration of admissibility, even before the matter is judicially determined by a Pre-Trial Chamber.

In general terms, the USA has a robust system of justice and laws which are capable of being interpreted to apply to crimes carried out by its nationals in the context of extraordinary rendition and secret detention operations in a host of countries. In principle, US civilian and military courts can exercise jurisdiction over conduct that would constitute a war crime, crimes against humanity or genocide when committed abroad by US nationals. However, the actions of the competent USA authorities to date makes clear that there is no active criminal investigation and genuine investigations and prosecutions are extremely unlikely in the near to mid-term future.

After President Obama entered office, a number of steps were taken to investigate certain aspects of the high value detainee interrogation programme, however, these have not privileged prosecutions. In fact, President Obama gave assurances to CIA employees that those who had used the "enhanced interrogation techniques" would not face prosecution.[39] The Office of Professional

[37] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 'Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011', ICC-01/09-01/11-307, 30 August 2011, para. 62.
[38] *The Prosecutor v. Simone Gbagbo*, 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo' ICC-02/11-01/12-47-Red, 11 December 2014, para 78; affirmed by the Appeals Chamber in *The Prosecutor v. Simone Gbagbo*, 'Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo"', ICC-02/11-01/12-75-Red 27-05-2015, 27 May 2015.
[39] Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on Release of Material on Past Detention Practices, 24 August 2009.

Responsibility submitted a report concerning "enhanced interrogation techniques" in which it was recommended that the Department re-examine previous decisions to decline prosecution in several cases relation to the interrogation of certain detainees.[40] Then-Attorney General Eric Holder opened 'a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations,'[41] and appointed John Durham to lead it. The preliminary review was to focus on low level perpetrators who acted outside of the guidance (thus not pursuing the leaders and planners of the programme, not accounting for the fact that the guidance in force at the time was unlawful). Mr Holder made clear that, there will be no prosecutions for persons who acted in good faith and within the scope of the guidance given by the Office of Legal Counsel regarding the interrogation of detainees.[42] And eight years after the statement was made, not a single investigation has been opened into such cases.[43] It is unlikely that the Trump administration will suddenly decide to pursue investigations and prosecutions, particularly given President Trump's rhetoric on waterboarding and other forms of torture.

The US Government has claimed that it has carried out numerous trials and 200 investigations that have resulted in non-judicial punishment.[44] However, in order for these to impact on the ICC's jurisdiction they would need to concern Afghanistan and, should a case develop before the ICC in this way, the use of "enhanced investigation techniques" amounted to torture or other prohibited treatment in the context of secret detentions and renditions. There is no known US prosecution concerning such facts. According to the Senate Select Committee Investigation,

> On two occasions in which the CIA inspector general identified wrongdoing, accountability recommendations were overruled by senior CIA leadership. In one instance, involving the death of a CIA detainee at COBALT, CIA Headquarters decided not to take disciplinary action against an officer involved because, at the time, CIA Headquarters had been "motivated to extract any and all operational information" from the detainee. In another instance related to a wrongful detention, no action was taken against a CIA officer because, "[t]he Director strongly believes that mistakes should be expected in a business

[40] Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (24 August 2009).
[41] Ibid.
[42] Ibid.
[43] A civilian CIA contractor was convicted of beating a detainee to death in Afghanistan, in a case in which it was clear that the contractor acted outside of guidance. See, *United States v. Passaro*, Nos. 07-4249, 07-4339, 2009 WL 2432356 (4th Cir. Aug. 10, 2009)
[44] Referenced in OTP, 'Report on Preliminary Examination Activities 2016', 14 November 2016, para.220.

> filled with uncertainty,' and 'the Director believes the scale tips decisively in favor of accepting mistakes that over connect the dots against those that under connect them." In neither case was administrative action taken against CIA management personnel.[45]

The SSCI findings are similar to the concluding observations of the UN Committee Against Torture, issued following the USA's more recent periodic reports.[46]

> The Committee 'expresses concern over the ongoing failure on the part of the State party to fully investigate allegations of torture and ill-treatment of suspects held in United States custody abroad, evidenced by the limited number of criminal prosecutions and convictions. In that respect, the Committee notes that during the period under review, the United States Department of Justice successfully prosecuted two instances of extrajudicial killings of detainees by Department of Defense and CIA contractors in Afghanistan. It also notes the additional information provided by the State party's delegation regarding the criminal investigation undertaken by Assistant United States Attorney John Durham into allegations of detainee mistreatment while in United States custody at overseas locations. The Committee regrets, however, that the delegation was not in a position to describe the investigative methods employed by Mr. Durham or the identities of any witnesses his team may have interviewed. Thus, the Committee remains concerned about information before it that some former CIA detainees, who had been held in United States custody abroad, were never interviewed during the investigations, which casts doubts as to whether that high-profile inquiry was properly conducted. The Committee also notes that the Justice Department had announced on 30 June 2011 the opening of a full investigation into the deaths of two individuals while in United States custody at overseas locations. However, Mr. Durham's review concluded that the admissible evidence would not be sufficient to obtain and sustain convictions beyond a reasonable doubt. The Committee shares the concerns expressed at the time by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment over the decision not to prosecute and punish the alleged perpetrators. It further expresses concern about the absence of criminal

[45] Senate Select Committee on Intelligence (SSCI), 'Committee Study of the CIA's Detention and Interrogation Program' Findings and Conclusions, #17.
[46] UN Committee Against Torture, 'Concluding observations on the combined third to fifth periodic reports of the United States of America' UN Doc CAT/C/USA/CO/3-5, 19 December 2014.

> prosecutions for the alleged destruction of torture evidence by CIA personnel, including the destruction of the 92 videotapes of interrogations of Abu Zubaydah and Abd al-Rahim al-Nashiri that triggered Mr. Durham's initial mandate. The Committee notes that, in November 2011, the Justice Department had decided, based on Mr. Durham's review, not to initiate prosecutions of those cases (arts. 2, 12, 13 and 16).[47]

On the basis of the above, absent a radical shift in approach by the US Department of Justice, it appears clear that the ICC Prosecutor would have little difficulty to demonstrate to the Court that there is no active investigation or prosecution.

V.2 European States

ICC States Parties in Europe allegedly participated in the CIA High Value Detainee programme by hosting secret detention sites where detainees were subjected to a plethora of unlawful treatment including torture, and from where detainees were extraordinarily rendered to other locations even though there was a real risk that the individuals would be subjected to further torture and potentially the death penalty. Complementarity is relevant to these States in respect to whether those States have already or are currently carrying out genuine investigations and prosecutions into criminal acts which took place on their territory. It is relevant in respect of investigations and prosecutions of possible criminal acts of their own nationals, as well as of foreign nationals operating on their territories.

Poland

Poland is said to have hosted a secret detention centre at Stare Kiejkuty, a military base located near Szymany airport from where renditions of suspects took place. In January 2014, the Washington Post published details of what it alleged was a USD 15 million payment made in early 2003 for Poland's agreement to host the CIA black site at Stare Kiejkuty, and named of a number of those alleged to have been involved.[48]

[47] Ibid, para. 12.
[48] Adam Goldman, 'The hidden history of the CIA's prison in Poland', *Washington Post*, 23 January 2014.

Investigations in Poland have been limited and the results have not been publicly disclosed. A Polish parliamentary inquiry was conducted in 2005, which was criticised as being insufficiently credible and transparent.[49] In 2008, a criminal investigation was opened, and it has remained open ever since, though little information has been disclosed about its progress, and there is an absence of tangible results. In 2010, the UN Committee Against Torture expressed concern that 'the investigation … has not yet been concluded (arts. 2, 7 and 9).'[50]

In July 2014, the European Court of Human Rights issued two separate judgments finding that the Polish government colluded with the CIA to establish the secret detention facility. In the *Al-Nashiri* case, the Government of Poland argued that the application was premature, because there was an open criminal investigation into the subject matter of the application.[51] This was countered by the Applicant, who argued that the pending criminal investigation had been 'inordinately delayed, subject to undue political influence and ineffective.'[52] The Court concluded that the investigation was not prompt, thorough and effective and thus did not fulfil the requirements of the procedural limb of Article 3 (prohibition of torture and ill-treatment) of the Convention,[53] and therefore it rejected the Government's preliminary objection on non-exhaustion of domestic remedies. Identical arguments were raised in the *Abu Zubaydah* case, with the same result.[54]

The admissibility test and as with the Polish cases, the procedural limb of a European Court of Human Rights Article 2 or Article 3 investigation (where joined with the admissibility) bears similarities with the scrutiny the ICC must undertake when considering whether a national criminal investigation was sufficiently robust so as to make a case before the ICC inadmissible. The ICC will be looking for a sign that the investigation is 'active', that 'concrete, tangible and progressive steps' are being taken with the national investigation or prosecution. The European Court of Human Rights will be assessing these same issues.

[49] Summarised in *Husayn (Abu Zubaydah) v. Poland,* Judgment (Merits and Just Satisfaction), Appl. No 7511/13, 24 July 2014, paras.122-124.
[50] UN Human Rights Committee, 'Concluding observations of the Human Rights Committee: Poland', UN Doc CCPR/C/POL/CO/6, 15 November 2010, para. 15.
[51] *Al Nashiri v. Poland* (Merits and Just Satisfaction) Appl. No. 28761/11, 24 July 2014, paras. 339, 340.
[52] Ibid, para. 341.
[53] Ibid, para. 499.
[54] *Husayn (Abu Zubaydah) v. Poland,* Judgment (Merits and Just Satisfaction), Appl. No 7511/13, 24 July 2014, paras.333-337, 493.

Lithuania

Lithuanian authorities have failed to carry out an adequate and effective investigation of the allegations concerning secret detention and rendition.

The Lithuanian Parliamentary Committee on National Security and Defence (Seimas CNSD) conducted an Inquiry into Lithuania's involvement in the CIA's secret detention programme in 2009. The Inquiry found direct cooperation between the State Security Department (SSD) and the CIA. It also determined that the CIA requested the SSD to assist with the preparation of detention facilities that would house persons suspected of terrorism-related activities and that two locations were prepared. While the Committee failed to established whether CIA detainees were transported through the territory of Lithuania or brought into or out of Lithuania, the conditions for such transportation did exist.

In January 2010, the Lithuanian Office of the Prosecutor General initiated a pre-trial investigation. however, the investigation was limited to possible abuse of office by Lithuanian officials. The investigation was closed in January 2011, citing the expiry of a five year statute of limitations for the offence of abuse of office and a lack of clear evidence. In 2013, the European Parliament urged Lithuania to reopen the criminal investigation into CIA secret detention facilities and has asked Lithuania inter alia, to allow investigators to examine comprehensively, the renditions flight network and contact persons publicly known to have organized or participated in the flights in question; to carry out forensic examination of the prison site and analysis of phone records.[55] A subsequent criminal investigation was opened in 2014 following a complaint lodged by REDRESS and Lithuanian NGO, the Human Rights Monitoring Institute (HRMI) in 2013 regarding the alleged transfer, secret detention, torture and inhuman and degrading treatment of Mustafa Al-Hawsawi. That investigation was limited to unlawful transportation of persons across the state border. After the release of the SSCI report, the initial investigation of 2010 was reopened and merged with the ongoing investigation into unlawful transportation of persons across the state border.

Similar to the Polish investigation, very limited information has been publicly disclosed about the progress of the investigation. Mustafa Al-Hawsawi's request for victim status and to expand the scope of the investigation were both rejected, and a claim is pending before the European Court of Human Rights. In February 2016, Lithuania advised the UN Human Rights Committee that 'The said pre-trial investigation is ongoing and is conducted by a group of prosecutors. If sufficient factual data are collected, other

[55] European Parliament, 'European Parliament resolution on alleged transportation and illegal detention of prisoners in European countries by the CIA' 2013/2702(RSP) 10 October 2013, para. 4.

significant circumstances emerge or other alleged criminal offences are detected in the course of the criminal proceedings, the scope of the pre-trial investigation may be extended. The norms of criminal procedure, which apply to the current pre-trial investigation, do not limit the scope of the investigation. If the elements of any other alleged criminal offences are detected, their investigation within the said pre-trial investigation shall be commenced and conducted on the basis of other norms of the Criminal Code of the Republic of Lithuania.'[56]

Romania

Romania is alleged to have hosted a CIA detention centre and to have engaged in the USA extraordinary renditions programme.[57] The SSCI report findings on detention site BLACK (understood to refer to Romania) note that detainees were transferred there in 2003 and recount numerous examples of resort to "enhanced interrogation techniques".[58] Romania has consistently denied the presence of a CIA detention site on its territory, however the Council of Europe found that the Romanian Senate Inquiry Committee's conclusions 'cannot be sustained. The Committee's work can thus be seen as an exercise in denial and rebuttal, without impartial consideration of the evidence. Particularly in the light of the material and testimony I have received from sources in Romania, the Committee does not appear to have engaged in a credible and comprehensive inquiry.'[59]

The Open Society Justice Initiative has filed a claim on behalf of Abd al Rahim al Nashiri against Romania before the European Court of Human Rights. An oral hearing in the case took place on 29 June 2016. At the time of writing, the decision was pending. Similar to the Polish cases, It is argued that Romania failed to conduct a prompt and effective investigation into the secret prison and the associated violation of al-Nashiri's rights.

VI. Gravity

In accordance with Article 17(4) of the ICC Statute, a case must be sufficiently grave for it to be admissible before the Court. The Prosecutor has assessed this to include 'the scale, nature, and manner of commission

[56] HRC, Concluding observations on the third periodic report of Lithuania, Addendum: Information received from Lithuania on follow-up to the concluding observations* [Date received: 12 January 2016] , CCPR/C/LTU/CO/3/Add.2, 12 Feb 2016, para. 34.
[57] Mr Dick Marty , '*Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*,' Parliamentary Assembly of the Council of Europe, Doc. 11302, 11 June 2007.
[58] SSCI, refers to the techniques used on Arsala Khan, Janat Gul, Abd al Rahim al-Nashiri, Hassan Ghul and Abu Faraj Al-Libi.
[59] Ibid, para 230

of the crimes, and their impact, bearing in mind the potential cases that would be likely to arise from an investigation of the situation,'[60] having regard to both quantitative and qualitative considerations.

Does the practise of extraordinary rendition rise to the requisite level of gravity required by the ICC Statute? The Prosecutor herself notes that 'at least 88 persons in US custody were allegedly tortured. The information available suggests that victims were deliberately subjected to physical and psychological violence, and that crimes were allegedly committed with particular cruelty and in a manner that debased the basic human dignity of the victims. The infliction of "enhanced interrogation techniques," applied cumulatively and in combination with each other over a prolonged period of time, would have caused serious physical and psychological injury to the victims. Some victims reportedly exhibited psychological and behavioural issues, including hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation. The gravity of the alleged crimes is increased by the fact that they were reportedly committed pursuant to plans or policies approved at senior levels of the US government, following careful and extensive deliberations.'[61]

The past practice of the Prosecutor in assessing gravity is somewhat ambiguous, or perhaps evidence of a wide discretion. In the Venezuela and Republic of Korea examinations, the Prosecutor declined to seek authorisation to commence an investigation because of the view that the available information did not provide a reasonable basis to believe that a crime under the jurisdiction of the Statute was committed,[62] at least in part having to do with the insufficient scale of the events. Similarly with respect to Iraq, the Prosecutor came to an initial decision not to proceed with an investigation. The view taken was that the required gravity threshold of the Rome Statute had not been met.[63] In assessing gravity, the Office appears to have focused solely on a quantitative analysis.[64] It indicated that

> The Office considers various factors in assessing gravity. A key consideration is the number of victims of particularly serious crimes, such as wilful killing or rape. The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth

[60] OTP, 'Policy Paper on Preliminary Examinations' November 2013, para. 3.See also, Regulation 29(2) of the Regulations of the Office of the Prosecutor.
[61] OTP, 'Report on Preliminary Examination Activities 2016', 14 November 2016, para. 224.
[62] OTP, 'OTP response to communications received concerning Venezuela', 9 February 2006; OTP, ' Situation in the Republic of Korea: Article 5 Report' 23 June 2014.
[63] OTP, 'OTP response to communications received concerning Iraq', 9 February 2006.
[64] See Schabas, 'Prosecutorial Discretion *v.* Judicial Activism at the International Criminal Court' (above n. 21) who criticises the Prosecutor's approach to gravity.

> bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.[65]

The preliminary examination concerning Iraq was later reopened after the receipt of additional information.[66] In the matter referred by the Union of the Comoros – concerning the Mavi Marmara flotilla, which concerned the 31 May 2010 interception by Israeli Defense Forces of a humanitarian aid flotilla on route to the Gaza Strip, in which ten passengers were killed and more than 50 injured, the Prosecutor decided not to start an investigation.[67] She indicated that 'the potential case(s) likely arising from an investigation into this incident would not be of "sufficient gravity" to justify further action by the ICC.'[68] This matter was then appealed,[69] and is now pending.[70] In coming to this conclusion on the insufficient gravity, she distinguished the case from *Abu Garda*, which also concerned a single attack involving a relatively small number of victims, on the basis that *Abu Garda* concerned the killing of peacekeepers,[71] thus placing the nature and the impact of the crimes in a different realm.

In her 2016 report on preliminary examinations, the ICC Prosecutor writes that a 'limited number of alleged crimes associated with the Afghan armed conflict are alleged to have been committed on the territories of Poland, Lithuania and Romania, which are parties to the Statute.'[72] While the number of alleged crimes is only a portion of the consideration regarding gravity, there would arguably be an uphill battle for the ICC Prosecutor to demonstrate sufficient gravity had these crimes been considered independent of the wider Afghanistan situation, and were the focus to be on suspects from those three European States Parties, as opposed to the wider and more intensive involvement of US authorities at a senior level. It reminds of the Prosecutor's public statement regarding crimes allegedly committed by IS or Daesh in Iraq and Syria, non-States Parties to the ICC Statute. She notes that 'The information gathered indicates that several thousand

[65] OTP, 'OTP response to communications received concerning Iraq', pp 8-9.
[66] OTP, 'Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq', 13 May 2014.
[67] OTP, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: "Rome Statute legal requirements have not been met"', 6 November 2014.
[68] Ibid.
[69] Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom Of Cambodia, 'Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation' ICC-01/13-3-Red 29 January 2015, paras 58, 59
[70] 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation', ICC-01/13-34, 16 July 2015. Note however, the 'Partly Dissenting Opinion of Judge Péter Kovács', ICC-01/13-34-Anx-Corr, 16 July 2015.
[71] OTP, 'Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report', 6 November 2014, pp 58, 59, para 145.
[72] OTP, 'Report on Preliminary Examination Activities 2016', 14 November 2016, para. 199.

foreign fighters have joined the ranks of ISIS in the past months alone, including significant numbers of State Party nationals from, *inter alia*, Tunisia, Jordan, France, the United Kingdom, Germany, Belgium, the Netherlands and Australia. Some of these individuals may have been involved in the commission of crimes against humanity and war crimes. A few have publicised their heinous acts through social media. The information available to the Office also indicates that ISIS is a military and political organisation primarily led by nationals of Iraq and Syria. Thus, at this stage, the prospects of my Office investigating and prosecuting those most responsible, within the leadership of ISIS, appear limited. In this context, I have come to the conclusion that the jurisdictional basis for opening a preliminary examination into this situation is too narrow at this stage.'[73]

VII. Interests of Justice

The Prosecutor may also take the decision not to proceed on the basis of the 'interests of justice'. The Statute provides that when the Prosecutor is satisfied that there is a reasonable basis to believe that the case is within the jurisdiction of the Court and would be admissible, she can nevertheless decide not to proceed when, 'taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.'[74] Similarly, Article 53(2) addresses the ability of the prosecutor to forego a prosecution. It indicates that, upon investigation, the Prosecutor may conclude that there is not a sufficient basis to proceed because it 'is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrators, and his or her role in the alleged crime.'

However, in her 2016 Report on Preliminary Examinations, the Prosecutor indicates that 'In light of the mandate of the Office, as well as the object and purpose of the Statute, and taking into account the gravity of the crimes and the interests of victims, based on the information available the Office would have no substantial reasons to believe that the opening of an investigation would not be in the interests of justice.'[75]

[73] OTP, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS' 8 September 2015.
[74] ICC Statute, Article 53(1)(c).
[75] OTP, 'Report on Preliminary Examination Activities 2016', 14 November 2016, para. 225.

VIII. Why the ICC Prosecutor's engagement is important

It has been almost fifteen since the height of the CIA secret detention and rendition programme. The world's largest and most developed democracy unleashed a criminal programme in which it and its co-conspirators deprived more than a hundred persons of their most basic human rights and there has been virtually no accountability. To the contrary, the narrative which persists among vast segments of societies is that these persons (regardless of who they actually are and the tenuousness of the evidence that linked many of them to the crimes) should have no rights; what was done was appropriate and justifiable in light of the horrors of the 11 September 2001 attacks. This narration promotes a vision whereby the denial of rights is meted out both as a form of collective punishment and as a guise to promote national security at all costs. These narratives need to be challenged.

The International Criminal Court was established to deal with the most egregious cases and to help end impunity for the worst crimes under international law. But our vision of the worst crimes must account not only for the numbers of the dead and the maimed but also through the lens of the greatest abusers of power; those that see themselves as untouchable. An appropriate response to the preliminary examination from the US and other complicit governments would be to fully investigate and prosecute the offences themselves. Yet, from the US there is grandstanding. Dick Cheney has boasted about waterboarding and "enhanced interrogation techniques," that "I'd do it again in a heartbeat." Donald Trump has said he "would bring back waterboarding and I'd bring back a hell of a lot worse than waterboarding." And from the other States there is obfuscation and denial. Watch this space. The predictions of what will happen next should the ICC approve an arrest warrant, depend on whether one is an optimist, a pessimist or a pragmatist.